



(28,724)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 769.

JOHANNA FRESE, ADMINISTRATRIX OF THE ESTATE OF
JOSEPH J. FRESE, DECEASED, PETITIONER,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD
COMPANY.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE STATE OF MISSOURI.

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JOHANNA FRESE, ETC., VS. C., B. & Q. R. R. CO.

JOHANNA FRESE, Administratrix of the Estate of Joseph J. Frese,
Plaintiff,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Defendant.

We the jury in the above entitled cause find for the plaintiff in the sum of Twelve Thousand (\$12,000.00) Dollars.

G. O. MAXWELL,
Foreman."

It is therefore ordered, adjudged and decreed by the Court that the plaintiff do have and recover of and from the defendant her damages as found by the Jury in the sum of Twelve Thousand (\$12,000.00) Dollars, and her costs in this behalf laid out and expended and have execution therefor.

And afterwards, to-wit, on the 20th day of February 1919, the same being the 40th day of the said January 1919 Term of said Circuit Court aforesaid, the following further proceedings were had and entered of record, to-wit:

29182.

JOHANNA FRESE, Administratrix of the Estate of Joseph J. Frese,
Deceased, Plaintiff,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Defendant.

Now at this day comes the defendant in the above entitled cause and by its attorneys, and files herein its motion for a new trial, and also the said defendant files herein its motion in arrest of judgment.

And afterwards, to-wit, on the 14th day of March, 1919, the same being the 59th day of the said January 1919 Term aforesaid, the following further proceedings were had and entered of record, to-wit:

29182.

JOHANNA FRESE, Administratrix of the Estate of Joseph J. Frese,
Deceased, Plaintiff,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Defendant.

Comes now the parties plaintiff and defendant by their respective attorneys, and the motion for a new trial, heretofore filed by the defendant to set aside the verdict and judgment herein, is at this time taken up, considered by the court, and the same is by the Court overruled.

Come now the parties plaintiff and defendant as aforesaid, and the motion in arrest of judgment, heretofore filed herein, is at this time taken up and considered by the Court, and the same is by the Court overruled.

And now here the defendant has leave to file bill of exceptions during the next regular May 1919 Term of this Court.

Comes now the defendant, by its attorneys, Roberts & Spencer, and files affidavit for an appeal, and said appeal is allowed to the Supreme Court of the State of Missouri.

And it is further ordered by the Court that the amount of the Appeal Bond be fixed at Twenty-five Thousand (\$25,000.00) Dollars, and that the defendant have leave to file said bond within ten days

from and after the adjournment of this Court for this term,
4 and if said bond be filed in vacation, the same to be approved by the Clerk of this Court.

STATE OF MISSOURI,

County of Buchanan, ss:

I, Emmett J. Crouse, Clerk of the Circuit Court, in and for the State and County aforesaid, do certify that the foregoing is a full, true and complete copy of judgment and order allowing appeal; made as aforesaid in the above entitled cause as the same appears of record and on file in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said Court at office in the City of St. Joseph, this 18th day of March, A. D. 1919.

[SEAL.]

EMMETT J. CROUSE,

Clerk,

By R. T. MUMFORD,

Deputy.

5 And thereafter, to-wit, on December 1, 1920, Appellant filed herein its Abstract of Record, which said Abstract of Record is in words and figures as follows:

In the Supreme Court of Missouri, Division No. One, October Term, 1920.

No. 21659.

JOHANNA FRESE, Administratrix of the Estate of Joseph J. Frese,
Deceased, Respondent,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Appellant.

Appeal from the Circuit Court of Buchanan County, Missouri.

Hon. Thomas B. Allen, Judge.

APPELLANT'S ABSTRACT OF THE RECORD.

Statement.

This is an appeal from the Circuit Court of Buchanan County, Division No. 1, Honorable Thomas B. Allen, judge thereof, wherein Johanna Frese, Administratrix of the estate of Joseph J. Frese, deceased, respondent, recovered a judgment for \$12,000 against the Chicago, Burlington & Quincy Railroad Company for its alleged negligence in causing the death of Joseph J. Frese on October 30, 1916. The suit was instituted on December 15, 1916 and the cause was tried on February 17th and 18th, 1919, during the regular January, 1919, term of the said court.

Plaintiff's Second Amended Petition.

The plaintiff's second amended petition, upon which the cause was tried, is as follows, to-wit:

In the Circuit Court of the State of Missouri within and for Buchanan County, May, 1917, Term Thereof.

No. 29182.

JOHANNA FRESE, Administratrix of the Estate of Joseph J. Frese,
Deceased, Plaintiff,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Defendant.

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Second Amended Petition.

Plaintiff for her second amended petition and cause of action states that she is the widow of Joseph J. Frese, deceased, who died as the result of injuries inflicted as hereinafter set forth on the 30th

day of October, 1916, with his mansion house and principal place of abode in the City of Quincy, Adams County, Illinois; that by the County Court of Adams County, Illinois, it being the court having jurisdiction of Probate matters, she has been duly and regularly appointed Administratrix of the estate of Joseph J. Frese, deceased, and letters of administration have been duly and regularly issued to her by said court, and she is now the personal representative of Joseph J. Frese, deceased, within the meaning of the laws of the State of Illinois and the laws of the United States; that at the time of his death Joseph J. Frese left surviving him his widow, Johana Frese, and the following children: Helen Frese, a daughter, aged 25 years; Selma Kron, née Frese, a daughter, aged 22 years; Albert Frese, a son, aged 20 years; Joseph Frese, a son, aged 18 years; Herbert Frese, a son, aged 15 years; Ruth Frese, a daughter, aged 5 years; that he left surviving him no other child or descendant of a deceased child; that in his lifetime he was the sole support and maintenance of the plaintiff and his minor children, and at all times prior to his death was an able-bodied, intelligent and healthful man, earning wages in excess of \$220.00 per month, and with opportunities for, and the ability to, increase his earning capacity, and at the time of his death he was 54 years of age.

That at all times herein mentioned the defendant was, and now is, a railroad corporation, duly organized and operating a line of railroad into and through the states of Missouri, Illinois, Iowa, Kansas and other states, and into and through the City or Town of Hull, in Pike County, Illinois; that at all the times herein mentioned the defendant was, and now is, engaged as a common carrier by railroad in interstate commerce between the several states of Missouri, Illinois, Kansas, Iowa and other states; that at all the times herein mentioned, and particularly on the 30th day of October, 1916, the defendant maintained a railroad track running into and through the town of Hull and into and through Pike County, Illinois, and crossing the railroad tracks of the Wabash Railway Company; that the railroad track of the defendant company at and for a considerable distance on each side of its intersection with the track of the Wabash Railway Company runs in a southeasterly and northwesterly direction in a straight line; that the track of the Wabash Railway Company at its point of intersection with, and for a long distance on each side of the track of the defendant company, runs in an easterly and westerly direction in a straight line; that in approaching said crossing from the north and west upon defendant's track from the fireman's side of an engine there is an intermittent view of a train approaching from the east on the Wabash track, situated anywhere from eighty (80) feet east of the crossing to a point east of the said crossing along the Wabash track more than three hundred fifty (350) feet along the defendant's track north and west of the crossing to a distance of less than ninety (90) feet north and west of the crossing; that the view from the fireman's side of the engine in approaching the crossing along defendant's track from a point three hundred fifty (350) feet distant

from the crossing to a point less than ninety (90) feet from the crossing going in a southeasterly direction there are numerous places where and from which it is impossible to see a train approach-

10 ing the crossing on the Wabash track from the east toward the crossing; that on and for a long time prior to the 30th day of October, 1916, the defendant carelessly and negligently placed and maintained a stop post at a distance of one hundred ninety-seven (197) feet north and west along defendant's track from the said railroad crossing, and carelessly and negligently required the deceased, Joseph J. Frese, and its employees in charge of an engine approaching said track to bring the engine and train to a stop at said post for the purpose of permitting the engineer to positively ascertain that the way was clear, and that the train could safely resume its course before proceeding to pass the said crossing; that on and for a long time prior to said date, neither the engineer nor the fireman in charge of an engine approaching said crossing from the north and west upon defendant's track bringing the engine to a stop at said stop post could see a train approaching said crossing from the east on the Wabash tracks at certain points on said Wabash track from the crossing to a point five hundred (500) feet east of the crossing; that as hereinabove set forth a train upon the Wabash track could be intermittently seen from the fireman's side of the engine, but not from a position where said engine was re-

11 quired by the defendant company to be stopped at said stop post; that at all the times herein mentioned it was a part of the duties of the fireman upon an engine of the defendant company in approaching the crossing of the Wabash Railway Company's tracks from the north and West to keep a lookout for trains approaching on the Wabash track from the east; that at all the times herein mentioned it was the duty of the brakeman upon defendant's trains in going through towns or approaching railroad crossings to be upon the top of a freight or mixed train or in the engine cab and to keep a lookout for danger and for trains approaching on other tracks or crossings.

Plaintiff further states that on the 30th day of October, 1916, and prior thereto, Joseph J. Frese was in the employ of the defendant as a locomotive engineer and engaged in interstate commerce and working in intrastate commerce, and in charge of an engine and train approaching said crossing from the north and west; that a fireman in the employ of the defendant company was upon the engine being operated by Joseph J. Frese and was engaged in his duties upon said engine at and prior to the time of the collision hereinafter referred

to; that two brakemen in the employ of the defendant were
12 upon said train working in the performance of their duties thereon at and prior to the time of the said collision; that

the said Joseph J. Frese, while in the exercise of care and while in the performance of his duties and engaged in moving a locomotive engine and train of cars upon which he was an employee of the defendant company in interstate commerce, between the states of Missouri, Illinois, Iowa, Kansas and other states, and in Pike County, Illinois, and on the tracks of the defendant company in Pike County,

Illinois, where they approach and cross the tracks of the Wabash Railway Company, was injured, as a result of which injuries he died on said 30th day of October, 1916, by and through the negligence of the defendant company in maintaining the stop post, hereinabove set forth, at a point from which a view could not be had of a train approaching the crossing from the east on the Wabash track, and by and through the negligence of the defendant company in requiring the deceased, Joseph J. Frese, and its employees in charge of engines to stop the engine at said stop post for the purpose of positively ascertaining that the way is clear and that the engine and train could safely resume its course before proceeding to pass

the crossing, and for the purpose of ascertaining whether or not a train was approaching said crossing upon the Wabash

13 Railway Company's track from either the east or west direction, by and through the negligence of the defendant company and its officers, agents and employees in permitting, causing and directing said Joseph J. Frese to move the engine and train of cars upon which he was employed as a locomotive engineer, along the defendant's track in a southeasterly direction and into collision with a railroad engine and train operated upon the tracks of the Wabash Railway Company in said Pike County, Illinois, which were being moved along the Wabash tracks in a westerly direction, approaching said crossing, and through the negligence of the defendant company and its officers, agents and employees, in negligently failing to warn the said Joseph J. Frese, while he was approaching the crossing of the defendant company's railroad tracks and the Wabash Railway tracks in charge of the defendant's locomotive and train of cars, that an engine and train of cars was approaching and crossing upon the tracks of the Wabash Railway Company; and through the negligence of the defendant company and its agents, servants and employees and its brakemen in failing to be on top of the train or

in the engine and in a position to observe trains approaching the railroad crossing upon the track of the Wabash Railway
14 Company; and through the negligence of the defendant company and its agents, servants and employees, and its fireman upon said engine, and its brakeman working on said train, in failing to keep a lookout to observe the train approaching said crossing upon the Wabash track from the east, and within their line of vision, then and thereby causing and permitting a collision between the respective locomotives and trains of cars upon their respective railroad tracks; that all of the acts of the defendant company complained of herein were careless and negligent under and by virtue of the laws in force and effect in the State of Illinois at the times complained of.

That at the time of his death the said Joseph J. Frese was under the legal obligation of supporting plaintiff, his widow, and his minor children, and at all the times previous to his death he had provided for the support and maintenance of his said wife and all of his minor children, and for their education, care and training; that by his death plaintiff has lost the society of her husband and support and maintenance by him, and his minor children have lost the care of

15 their father in their education and training, and his children have lost the support and maintenance that otherwise would have been furnished them and would have been contributed by him but for his negligent killing by the defendant as hereinabove set forth; that plaintiff and the minor children of Joseph J. Frese have no property of any kind or character and no other means of support or maintenance; that by reason of the above and foregoing plaintiff, as the widow of Joseph J. Frese, and his children, to wit, Helen Frese, Selma Kron, née Frese, Albert Frese, Joseph Frese, Herbert Frese, and Ruth Frese, have been damaged in the sum of One Hundred Thousand Dollars (\$100,000.00).

Wherefore, plaintiff prays judgment against the defendant in the sum of One Hundred Thousand Dollars (\$100,000.00) and her costs in this behalf expended.

MYTTON & PARKINSON,
Attorneys for Plaintiff.

Defendant's Answer to Second Amended Petition.

The defendant's answer to the second amended petition, and upon which the cause was tried was in words and figures as follows, to wit:

In the Circuit Court of Buchanan County, Missouri, May Term,
A. D. 1918.

16 JOHANA FRESE, Administratrix of the Estate of Joseph J. Frese, Deceased, Plaintiff,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Defendant

Answer to Second Amended Petition.

Now comes the Chicago, Burlington & Quincy Railroad Company, th defendant in the above entitled cause, and for answer to plaintiff's second amended petition, admits that it was engaged in interstate commerce at the time and place mentioned in said petition; admits that the decedent, Joseph J. Frese, at the time of his death was employed in interstate commerce by railroad by the defendant, but defendant denies each and every other allegation in plaintiff's petition contained.

Defendant further answering plaintiff's second amended petition states that the plaintiff has no legal capacity to sue in this court; that the plaintiff is not authorized to institute and prosecute this action in the courts of the state of Missouri, and that she, as an administrator appointed in the courts of Illinois, has no power or authority to institute an action under the laws of the United States in the courts of Missouri.

17 Defendant further answering states that the death of the said Joseph J. Frese was caused by and was due to his own act, neglect and carelessness in operating and running the train upon which he

was an engineer over the tracks of the Wabash Railroad Company, in failing to have his train under control as he approached the crossing, in failing to ascertain and observe the Wabash train as it approached the crossing, in failing to observe the signals given by the men in charge of the Wabash train, and in failing to stop the train upon which he was engineer after he was warned of the approach of the Wabash train in ample time to avoid the collision, without any negligence on the part of the other employes of this defendant in any wise contributing thereto.

Defendant further answering states that at all times mentioned in plaintiff's petition there was in full force and effect within the state of Illinois a statute of that state, being Section 75 of Chapter 114, Hurd's Revised Statutes of Illinois for 1916, which, in words and figures was as follows, to wit:

18 "All trains running on any railroad in this State, when approaching a crossing with another railroad upon the same level, or when approaching a swing or draw bridge, in use as such, shall be brought to a full stop before reaching the same, and within eight hundred (800) feet therefrom, and the engineer or other person in charge of the engine attached to the train shall positively ascertain that the way is clear and that the train can safely resume its course before proceeding to pass the bridge or crossing."

That, under the provisions of the said statute, it was the duty of the decedent, Joseph J. Frese, as the engineer in charge of the train mentioned in plaintiff's petition, to positively ascertain that the way was clear and that the train could safely resume its course before proceeding to pass over the Wabash crossing; that the said Joseph J. Frese, in violation of the statute aforesaid, operated his train towards and over the said crossing without positively ascertaining that the way was clear, and without positively ascertaining that the train could safely proceed to pass over the crossing; that the death of the said Joseph J. Frese was caused by his own violation and disregard of the provisions of the said statute of the state of Illinois.

19 Defendant further answering states that the condition, nature and location of the trains, grounds, buildings, depots and stop posts at or near the point where the tracks of this defendant crossed the tracks of the Wabash Railroad Company at Hull, Ill., together with the view or obstructions to view, if any, at all points between the two tracks, were known fully to the decedent, Joseph J. Frese, and Plainly observable to a person of his age, experience and capacity, and he assumed all risks and hazards arising from the same.

Wherefore, defendant having fully answered, asks to be discharged.

CHICAGO, BURLINGTON & QUINCY
RAILROAD COMPANY.

By E. M. SPENCER,
M. G. ROBERTS,

Its Attorneys.

Plaintiff's Reply.

Plaintiff's reply to defendant's answer is as follows, to wit:

In the Circuit Court of the State of Missouri Within and for
Buchanan County, January Term, 1919.

20 JOHANNA FRESE, Administratrix of the Estate of Joseph J.
Frese, Deceased, Plaintiff,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Defendant

Comes now the plaintiff in the above entitled cause and for reply to defendant's answer to plaintiff's second amended petition filed herein denies each and every allegation of new matter therein contained.

Further replying plaintiff states that the deceased Joseph J. Frese, as engineer, caused the engine and train to be stopped within eight hundred feet of the crossing, and took every precaution within his line of duty and within his power to positively ascertain that the way was clear, and that his train could safely resume its course before proceeding to pass the crossing.

MYTTON & PARKINSON,

Attorneys for Plaintiff.

Record Entries, Trial, and Judgment.

21 In addition to the foregoing, the following facts are also shown by and appear from the records of the Circuit Court of Buchanan County, Missouri in the above entitled cause:

This cause, upon the foregoing pleadings, came on for trial in Division No. 1 of the said court on February 17, 1919 and during the regular January term, A. D. 1919 of the said court before the Honorable Thomas B. Allen, one of the judges of the said court, and a jury duly sworn to try the cause, resulting, on February 18, 1919, and during said term of court, in a verdict by the jury in favor of the plaintiff, respondent herein, and against the defendant, appellant herein, in the sum of \$12,000.

Thereafter, on February 20, 1919 and during said term of court, defendant duly filed its motion for new trial in the said cause, and, thereafter, on the same day last aforesaid, and during said term, the defendant also duly filed its motion in arrest of judgment in the said cause.

Thereafter, on March 14, 1919, and during said term of court, defendant's said motion for new trial was by the court taken up, considered, and the same was by the court overruled, and, thereafter, on the same day last aforesaid and during said term of court, de-

22 defendant's said motion in arrest of judgment in the said cause was by the court taken up, considered, and the same was by the court overruled.

Thereafter, on March 24, 1919 and during said January term of court, defendant duly filed its written application and affidavit for an appeal in the above entitled cause, all in due form, to the Supreme Court of Missouri, and the court thereupon and then and there granted and allowed the defendant an appeal in the above entitled cause to the Supreme Court of Missouri, having found the application and affidavit therefor to be sufficient in form and substance, and, thereafter, on the same day last aforesaid and during said January term, A. D. 1919 of said court, defendant was granted and allowed leave to file its bill of exceptions in the above entitled cause until and during the May term, A. D. 1919 of the said court, which leave to file bill of exceptions for good cause shown, was by the court in due time by orders duly entered of record, continued from term to term until and during the May term, A. D. 1920; that on March 24, 1919 and during the January term, 1919, of said court, the court fixed the appeal bond of the defendant in the above entitled cause at the sum of \$25,000.00 with leave to file the same during the said term of the said court, which bond, in due form, 23 was duly filed and duly approved by the court within the time granted therefor.

Thereafter, on May —, 1920, and during the May term of the said court, the defendant duly presented to the court and to the Honorable Thomas B. Allen, one of the judges of the said court who tried the said cause, its bill of exceptions in the above entitled cause, which bill of exceptions was by the court and judge duly approved, signed, sealed and allowed, and was then and there ordered to be made a part of the record in the above entitled cause, and the said bill of exceptions was then and there, on the day last aforesaid, in open court, pursuant to the order of the court as aforesaid, duly filed and entered upon the minutes and records of the said court and was duly made a part of the record proper in the above entitled cause.

The appeal of the defendant in the above entitled cause was duly and properly taken and its bill of exceptions was duly and properly filed, and a certified copy of the final judgment and the order granting the appeal in the above entitled cause was duly filed in this court.

Bill of Exceptions.

24 The bill of exceptions so filed, signed, sealed, allowed and made a part of the record in the above entitled cause, is in words and figures as follows, to wit:

Be it remembered, that on the seventeenth day of February, A. D. 1919, it being the thirty-seventh day of the regular January, 1919, term of the Circuit Court of Buchanan County, Missouri, Division Number One, the above entitled cause came on for hearing before

the Honorable Thomas B. Allen, Judge of said court, and a jury, duly sworn and empaneled to try the cause:

Messrs. Mytton and Parkinson and R. L. Duncan appeared as attorneys for the plaintiff.

Messrs. Roberts and Spencer appeared as attorneys for the defendant.

Thereupon the following proceedings were had and entered of record, to-wit:

Statement of Mr. Parkinson to the Jury.

May it please the court and gentlemen of the jury: I will make you a brief opening statement about what the evidence will show in this case so as we proceed with the trial, you will be able to understand more clearly the meaning of what the witnesses will say upon the witness stand.

25 The evidence will show that the Chicago, Burlington & Quincy Railroad Company was engaged as a common carrier by railroad in interstate commerce between various points in the states of Missouri and Illinois and other states in the Union; that they have a railroad track running into and through the town of Hull in the state of Illinois. This map, the evidence will show, represents the condition as it existed there and this Chicago, Burlington & Quincy Railroad Company's tracks running from the northwest to the southeast. The top of this map is north; The tracks of the Wabash Railway Company are represented by this line, and they run east and west. There is a Y running around on the north side of the Wabash and east of the Burlington track connecting these two tracks. Along north of this Y track there is a store building in here represented by that partial drawing there. Farther down there is an elevator and some other little buildings. There are some coal bins belonging here. The depot sits at an angle with the track about seventeen feet back of this corner and about twenty-three feet back of this corner. Mr. Frese was an engineer and worked for that company at that time. He was fifty-four years of age; he had a wife and four minor children, three of them

26 boys, the three oldest boys and a girl, the little girl you see over there, who at the time of her father's death, I think she was five years of age. The evidence will show that she was then in a crippled condition as a result of infantile paralysis. The evidence will show that during his lifetime the father earned something like \$200.00 a month as an engineer, and devoted all his earnings to the support of his family.

The evidence will show he cared for his children and was interested in their future, and was interested in teaching them and in the care of his children; that by his death this widow and these minor children suffered the loss of a parent and as well the care and attention he would have given them and suffered the loss of the earnings he would have received. If he were living today he would have earned much more than \$200.00 under increase of wages and other

conditions. The evidence will show that he was in perfect physical health.

The evidence will show there was a stop post represented by this red mark here, not this one but this one here. At that time it was one hundred ninety-seven feet from the crossing, from here to here.

From this stop post, which was an indication to him where he

27 should bring his engine to a stop in accordance with the rules of the company, and in accordance with the law that he had to stop within eight hundred feet, you could not see a train

any distance here but after you started down intermittently, while running this distance of about one hundred feet in here, you could see a long distance down this Wabash track. The evidence will be quite convincing on that, that there are points where you could not see in there, but there are other points where you could see a long distance; that if you are watching you could see.

The evidence will show from the engineer's side of the engine it was impossible to see out of and over the engine in front on account of electrical appliances, sand holder and other appliances on the engine or over the boiler within the engine. The evidence will show that by men who have made physical tests on this particular engine No. 1054, so there will be no doubt about that.

The evidence will show the custom and duty of this engineer as he approached was to stop at said post to ascertain whether a train was approaching; the method was for himself to take care of this side of the train to see whether the way was clear and to sound two whistles, which was an indication to the fireman and to tell him the

28 crossing was clear and that he was ready to proceed if the fireman said the way was clear on his side. It was never his

duty to leave the throttle; it was his duty to ascertain from the fireman whether or not anything was approaching from this side; that he ascertained that by sounding two whistles and then waiting a moment to give the fireman an opportunity to tell him if there was anything from that side, two signals telling him he had accepted the crossing and was about to proceed; that it was the duty of the fireman as the train approached this crossing or any other crossing to be on the look-out for trains approaching on another railroad track; that he is not permitted to be putting in a fire or engaging in any other line of work when approaching a railroad track; that his duty requires him to be on the look-out in order to fulfill his duty to the engineer when he sounds the whistle that he accepts the crossing to say whether anything is coming and then to keep a look-out until the crossing is passed so he can notify the engineer.

The evidence in this case will show you that his fireman was a Mr. Savage; the evidence will show you that he was in the corridor of the court room; his evidence will be—for his deposition has been taken—that he did not see this train until he got down so close to

29 the track that he was unable to only get down in the gangway of the engine and be thrown by the force of the collision of the Wabash train coming along this track. His evidence

will be that he is in their employ; that he did not have time to himself get loose; that the impact of the collision threw him, and that

the engineer, Mr. Frese, was not notified in time to save himself or leave his post in the cab of the engine. The evidence will show that this evidence is all in possession of this defendant and these gentlemen here; that he is their employee. He will also be compelled to admit when he goes on the stand that if he had looked out as he went down here he would have seen this Wabash train coming; that this train was going at a rate of speed of six or seven miles an hour and the Wabash at a rate of six or seven miles an hour; that at a number of places he could have seen the approaching train and could have notified the engineer.

The evidence will show that the Wabash train whistled also, that both whistled simultaneously; the evidence will show that the Wabash train stopped at some point and at the very instant they sounded the Burlington also sounded its whistle.

The evidence will also show that under the rules of this Burlington Company, it was the duty of the head brakeman to be upon
30 the top of the cars of the train while it was approaching the crossing in a position where he could have seen this train approaching on the Wabash track; the evidence of this Brakeman will show he is in the employ of the Burlington.

The evidence will also show you, gentlemen, that the accident in this case occurred about five-thirty in the afternoon of the 30th of October; that it was still light, getting dark but still light; that the Burlington agent was on duty at that time; that he knew the Wabash train was coming; that he knew the Burlington train was coming; that it was his duty under the rules, a part of his duty to protect the trains on the main line track; that he negligently failed to do so.

The evidence will show you, gentlemen, that this engineer had no possible chance to know of a train coming from that direction; that from his position which he was required to keep he had to rely upon his fireman to positively ascertain whether a train was or was not coming; that the fireman failed in his duty; that the brakeman failed in his duty; that the station agent failed in his duty;
31 that Mr. Frese went to his death and that this widow and these children were bereft of the care of a husband and father by reason of the negligence of these men.

The evidence will show you, gentlemen, that Mrs. Frese has been appointed administratrix of this estate and brings this suit as the personal representative to recover the pecuniary compensation due to herself as widow and to these minor children for the benefit of them, not for the estate, but for the pecuniary benefit of them.

The evidence will show, gentlemen, that at the time of his death Mr. Frese was earning a very little less than two hundred dollars a month; that at the present time he would have earned at least \$275.00 a month; that the expectancy of his life was eighteen years; that the absolute money damage to this family, aside from the care and protection of a husband and father, is something over \$60,000.00; that under the law enacted by Congress you will be expected to return a verdict, if the facts are as I have stated, for the temporary loss and for the pecuniary loss. This suit is for \$100,000.00. You

will be expected to bring in a verdict and measure your damages in accordance with the testimony given and the instructions given you by the court.

32 There will be some contention that Mr. Frese was killed by some negligence of his contributory to and causing his injury. I say the evidence will positively show that Mr. Frese was not negligent in any particular; that he was at his post of duty; that he had no way under the law or in fact to ascertain that the crossing was clear except to rely upon the fireman to watch on the east side; that the danger was from the fireman's side; that at the time he whistled that he accepted the crossing the fireman was looking down and not ahead for the on coming train; that there was nothing Mr. Frese could have done—if we prove these facts, gentlemen, we will ask these gentlemen to show such things as could have been done by Mr. Frese to you.

The plaintiff to sustain the issues on her part offered evidence as follows:

Mr. Parkinson: I offer in evidence at this time, your honor the petition of Johana Frese to the judge of the county court of Adams county, in the state of Illinois, to to be appointed as administratrix of the estate of her deceased husband, Joseph J. Frese and that the stenographer mark it, with the filing upon it, Plaintiff's Exhibit A.

Mr. Roberts: No objection.

The Court: Consider plaintiff's Exhibit A in evidence as there is no objection.

33 Which said Exhibit A is in words and figures as follows, to-wit:

Petition of Johanna Frese in the Matter of the Estate of Joseph J. Frese, Deceased, for Letters of Administration.

To the Hon. Judge of the County Court of Adams County, in the State of Illinois:

The petition of the undersigned Johanna Frese respectfully represents that Joseph J. Frese late of the county of Adams aforesaid, departed this life at Quincy, in said county, on or about the 30th day of October A. D. 1915, leaving no last will and testament as far as your petitioner knows or believes.

And this petition further shows that the said Joseph J. Frese died seized and possessed of real and personal estate, consisting chiefly of household and kitchen furniture & cash, all of said personal estate being estimated to be worth about eight hundred and fifty dollars. That said deceased left surviving Johanna Frese, his widow, and Helen Hummert, Selma Kron, Albert Frese, Joseph Frese, 34 Herbert Frese and Ruth Frese, his children as heirs. That your petitioner (being the widow of said deceased) and believing that said estate should be immediately administered as well for the proper management of said estate, and for the prompt col-

lection of the assets, by virtue of her right under the statute, she therefore pray- your Honor will grant letters of administration to her, whose postoffice address is 1105 Lind St., Quincy, Ills., upon taking the oath prescribed by the statute and entering into bond in such sum, and with securities, as may be approved by your Honor.

JOHANNA FRESE.

STATE OF ILLINOIS,
Adams County, ss:

The above named petitioner being duly sworn, deposes, and says that the statements averred in the above petition are true, according to the best of her knowledge, information and belief.

JOHANNA FRESE.

Subscribed and sworn to before me, this 8th day of December A. D. 1916.

LYMAN McCARL,
County Judge.

35 (Endorsed on the back.) Filed Dec. 8, 1917. W. J. Smith,
Clerk.

Mr. Parkinson: I offer in evidence Administrator's Bond, filed December 8, 1916, and ask that it be marked Plaintiff's Exhibit B, and offer it in evidence.

Mr. Roberts: No objection.

The Court: There being no objection, consider it in evidence.

Which said Exhibit B is in words and figures as follows, to-wit:

Estate of Joseph J. Frese, deceased.

Administrator's Bond.

In County Court, December Term, 1916.

STATE OF ILLINOIS,
Adams County, ss:

Know all men by these presents, that we, Johanna Frese as principal and August J. Dierkes and John Doerschner as sureties, of the county of Adams and state of Illinois, are held and firmly
36 bound unto the people of the state of Illinois, in the penal sum of seventeen hundred dollars, current money of the United States, which payment well and truly to be made and performed, we and each of us bind ourselves, our heirs, executors, and administrators jointly, severally and firmly by these presents.

Witness our hands and seals, this 8th day of December, A. D. 1916.

The condition of the above obligation is such That if the said Johanan Frese, Administratrix of all and singular, the goods and

chattels, rights and credits of Joseph J. Frese, deceased, do make, or cause to be made, a true and perfect inventory of all and singular, the goods and chattels, rights and credits of the said deceased, which shall come to the hands, possession or knowledge of the said Johanna Frese as such administratrix or to the hands of any person or persons for here and the same so made, do exhibit or cause to be exhibited in the County Court (or Probate Court) of the said county of Adams, agreeably to law, and such goods and chattels, rights and credits, do well and truly administer according to law, and all the rest of the said goods and chattels, rights and credits, which shall be found remaining upon the accounts of the said administratrix, the same being at first examined and allowed by the court, shall deliver and pay unto such person or persons, respectively, as may be legally entitled thereto, and further do make a just and true account of all her actings and doings therein, when thereunto required by the said court and if it shall appear that any last will and testament was made by the deceased, and the same be proved in court, and letters testamentary or of administration be obtained thereon, and the said Johanna Frese do, in such case, on being required thereto, render and deliver up the letters of administration granted to her as aforesaid, and shall in general do and perform all other acts which may at any time be required of her by law, then this obligation to be void; otherwise to remain in full force and virtue.

JOHANNA FRESE. [SEAL.]
 AUGUST J. DIERKES. [SEAL.]
 JOHN DOERSCHNER. [SEAL.]

STATE OF ILLINOIS,
Adams County, ss:

I, Lyman McCarl, a Notary Public, within and for said county and state, do hereby certify that Johanna Frese, Aug. J. Dierkes, John Doerschner, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered said instrument as their free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal, this 8th day of December A. D. 1916.

[SEAL.]

LYMAN McCARL,
Notary Public.

(Endorsed on the back.)

Approved by me, this 8th day of December, 1916.

LYMAN McCARL,
County Judge.

Filed Dec. 8, 1916.

W. J. SMITH,
Clerk.

Mr. Parkinson: I offer in evidence the letters of administration, with the filing mark thereon, issued to Johanna Frese, and ask that it be marked Plaintiff's Exhibit C.

The Court: Consider it in evidence.

Which said Exhibit C is in words and figures as follows, to-wit:

STATE OF ILLINOIS,
Adams County, ss:

The People of the State of Illinois to all to whom these presents shall come, Greeting:

Know ye, that whereas Joseph J. Frese, late of the county of Adams and state of Illinois, died intestate, as it is said, on or about the 30th day of October, A. D. 1916, having at the time of his decease, personal property in this state, liable to be lost, or destroyed or diminished in value, unless speedy care should be taken of the same.

To the end, therefore, that said property may be collected and preserved for those who shall appear to have legal right or interest therein, we do hereby appoint Johanna Frese of the county of Adams and state of Illinois, administratrix of all and singular the goods and chattels, rights and credits, which were of the said Joseph J. Frese at the time of his decease, with full power and authority to secure and collect the said property and debts, wheresoever the same may be found in this state, and in general, to do and perform all other acts which now are, or hereafter may be required of her by law.

Witness W. J. Smith, Clerk of the County Court of said County of Adams, and the seal of said court, at his office in Quincy, Ill., this 8th day of December A. D. 1916.

[SEAL.]

W. J. SMITH,
Clerk,

By J. C. WHITEFIELD,
Deputy.

STATE OF ILLINOIS,
Adams County, ss:

I do solemnly swear that I will well and truly administer all and singular the goods and chattels, rights, credits and effects of Joseph J. Frese, deceased, which remain to be administered upon, and pay all just claims and charges against said estate, so far as his goods, chattels and effects shall extend, and the law charge me and that I will do and perform all other acts required of me by law to the best of my knowledge and ability.

JOHANNA FRESE.

Sworn to and subscribed before me, this 8th day of Dec. A. D. 1916.

W. J. SMITH,
Clerk,

By J. C. WHITEFIELD,
Deputy.

(Endorsed on the back:) Letters of Administration Estate of Joseph J. Frese, deceased. Johanna Frese, Administrator. P. O. Quincy, Ill. Adams County Court. Recorded in volume 179, page 305. Adjustment Feb. 5, 1917. Filed Dec. 8, 1916. W. J. Smith, Clerk.

Mr. Parkinson: I offer in evidence judgment entry in the probate matter of the Estate of Joseph J. Frese, deceased, in the Adams County Court, of the state of Illinois, being the order appointing Johanna Frese, Administratrix of the Estate of Joseph J. Frese, deceased, and ask that the stenographer mark it Plaintiff's Exhibit D.

Mr. Roberts: Defendant objects to that for the reason that it does not prove or disprove any issue in this case.

The Court: You filed a general denial as to the appointment of the administratrix. The objection is overruled. Consider it in evidence.

To which action of the court in overruling said objection defendant at the time excepted, and still excepts.

Which said Exhibit D is in words and figures as follows, to-wit:

In the Adams County Court, in Probate, December Term, 1916.

On Friday the Eighth day of December, A. D. 1916.

Present:

Hon. Lyman McCarl, County Judge.

John Coens, Sheriff.

W. J. Smith, Clerk.

1. And now, on this day, in said Court comes Johanna Frese and duly files her petition to the Judge of said Court, in Probate, representing as follows, to-wit: That on or about the 30th day of October, A. D. 1916, Joseph J. Frese, late of said county of Adams and State of Illinois, departed this life intestate, having no property and effects in this County, and leaving no Will, Testament, Codicil or other writing relating to the disposal or distribution of his Estate, or any part thereof, so far as known or believed by Petitioner and having personal property to the value of about the sum of eight hundred and fifty (\$850.00) dollars. That said deceased left him surviving Johanna Frese his widow, and Helen Hummert, Selma Kron, Albert Frese, Joseph Frese, Herbert Frese and Ruth Frese his children, as heirs.

Your petitioner being the widow of said deceased, therefore prays that letters of Administration may be granted to her (Johanna Frese) which petition was sworn to by said petitioner. And it is thereupon ordered that the same be filed by the Clerk of this Court.

2. It being duly proved that Joseph J. Frese named in the foregoing order as having deceased, has departed this life, and no per-

44 son having appeared to oppose the granting of letters of Administration upon the estate of said deceased, or to object to the appointment of said Johanna Frese as Administratrix of said Estate, or to show cause why the prayer of said petitioner should not be allowed, it is ordered that the same be granted, provided the said Johanna Frese first file in this Court her bond as such Administratrix in the form required by law, in the penal sum of Seventeen Hundred (\$1,700.00) Dollars, with security or securities to be approved by the court and take and subscribe the oath as provided by law.

3. Pursuant to the last foregoing order, to-wit: on the eighth day of December, A. D. 1916, the said Johanna Frese comes and presents in said Court, for approval and acceptance of said Court, her bond as Administratrix of the estate of said deceased, in the penal sum of Seventeen Hundred (\$1,700.00) Dollars, signed and sealed by herself (Johanna Frese) as Principal, and by Aug. J. Dierkes and John Doerschner as securities, and said bond appearing to be in due form of law, and the security therein being deemed sufficient and satisfactory, it is therefore ordered that the same be, and is hereby approved and accepted, and that the clerk file and record the same.

45 4. Ordered, That the aforesaid Johanna Frese be and she is hereby appointed Administratrix of all and singular the goods and chattels, rights, credits and effects of Joseph J. Frese, deceased, and that the Clerk issue letters of administration under his hand and the probate seal of this Court, in accordance with this order and record the same.

5. That said Johanna Frese then filed in said Court a notice that she does thereby appoint the next February term of this Court, on the fifth day of said month, for the settling and adjusting all claims against the said decedent, and it is thereupon ordered that the said term and day be assigned for the hearing of claimants against said estate.

5. Mr. Parkinson: We offer in evidence the certificate of W. J. Smith, Clerk of the County Court, county of Adams, state of Illinois, certifying the annexed and foregoing writings to be true, perfect and complete copy of all the orders and records, including the application for the appointment of administratrix, bond and letters of administration in the estate of Joseph J. Frese, as the same appear of record and on file, and certifying that the county court has jurisdiction over the estates of deceased persons and the appointment of administrators in said estates, and had full and complete jurisdiction in all the proceedings hereinbefore recited, and the seal of the clerk of the court.

46 I also offer in evidence the certificate and oath of Lyman McCarl, presiding judge of the County Court of Adams County, Illinois certifying that the signature of W. J. Smith is genuine and that he was on the date of signing said certificate and at the time of the making of the certificate the clerk of the county court in and for the county of Adams, state of Illinois, duly elected and qualified to

office, and that full faith and credit are and of right ought to be given to his official acts as such in all courts of record, and elsewhere, and that his attestation is in due form of law and by the proper officer; that affiant is presiding judge of the county court of Adams County, Illinois and of the court wherein the foregoing proceedings were had and orders and appointment of administratrix made; that said county court and the presiding judge, of which court he was the presiding judge and had full jurisdiction over the estates of deceased persons and of the appointment of administrators of said estates, and that said court and presiding judge had full jurisdiction over all the proceedings herein-

before set out, together with the seal of the court, and also
 47 the oath, certificate and affidavit of W. J. Smith, Clerk of the County Court in and for the county of Adams, state of Illinois, certifying that Lyman McCarl, whose genuine certificate appears to the foregoing certificate, was, at the time of signing the same, the presiding judge of the County Court of Adams County, Illinois, duly commissioned and qualified, and full faith and credit are, and of right ought to be given to all his official acts, as such in all courts of record and elsewhere, together with his official signature and seal of office, and ask that these be marked together with the exhibits already introduced as Plaintiff's Exhibit E. I offer them now as a part of and certificate to such papers offered in evidence.

The Court: Consider them in evidence.

Which said Exhibit E is in words and figures as follows, to-wit:

STATE OF ILLINOIS,

Adams County, ss:

I, W. J. Smith, Clerk of the County Court of Adams, in the
 state of Illinois, aforesaid, do hereby certify the annexed and
 48 foregoing writings to be a true, perfect and complete copy of
 all the orders and records, including the application for appointment of administratrix, bond and letters of administration, in the estate of Joseph J. Frese, as the same appear of record and on file in my office, and I certify that said letters of administration were regularly and duly is-ued by me as clerk of this court, and that said county court has jurisdiction over the estates of deceased persons and the appointment of administrators of said estates, and had full and complete jurisdiction in all the proceedings hereinbefore recited.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said court at my office in Quincy, Illinois, on this 21st day of May, 1917.

[SEAL.]

W. J. SMITH,
Clerk of County Court.

STATE OF ILLINOIS,

Adams County, ss:

I, Lyman McCarl, Presiding Judge of the County Court of Adams County, Illinois, do hereby certify that W. J. Smith, whose

49 genuine signature is affixed to the above and foregoing certificate, was on the date of signing said certificate, and now is the clerk of the County Court in and for the county of Adams, State of Illinois, duly elected and qualified to office; and full faith and credit are, and of right ought to be given to his official acts as such in all courts of record and elsewhere, and that his attestation is in due form of law and by proper officer.

I further certify that I am the Presiding Judge of the county court of Adams County, Illinois, and of the court wherein the foregoing proceedings were had and orders and appointment of administratrix made.

I further certify that said County Court and the presiding judge thereof, in and for the County of Adams, and State of Illinois, of which Court I am the presiding Judge, has full jurisdiction over the estates of deceased persons and of the appointment of administrators of said estate, and that said Court and Presiding Judge had full jurisdiction over all the proceedings hereinbefore set out.

Given under my hand and seal of this court on this 31st day of May, 1917.

LYMAN MCCARL,

[SEAL.]

*Presiding Judge of the County Court
of Adams County, Illinois.*

STATE OF ILLINOIS,
Adams County, ss:

I, W. J. Smith, Clerk of the County Court in and for said County, in the State aforesaid, do hereby certify that the Hon. Lyman McCarl, whose genuine signature appears to the foregoing certificate, was, at the time of signing the same, the Presiding Judge of the County Court of Adams County, Illinois, duly commissioned and qualified, that full faith and credit are, and of right ought to be given to all his official acts as such in all Courts of record and elsewhere.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Quincy, Illinois, on this 31st day of May, 1917.

[SEAL.]

W. J. SMITH,
Clerk of County Court.

51 The plaintiff, to sustain the issues on her part, offered the following further testimony:

JOHANNA FRESE, having been first duly sworn as a witness on the part of the plaintiff, testified as follows:

Direct examination.

By Mr. Parkinson:

Q. Will you state your full name, please?

A. Johana Frese.

Q. Johana Frese?

A. Yes, sir.

Q. Were you the wife of Joseph J. Frese in his lifetime?

A. Yes, sir.

Q. You are now his widow?

A. Yes, sir.

Q. At the time of his death where was Mr. Frese's home?

A. 1105 Lynn Street, Quincy.

Q. 1105 Lynn Street, Quincy, Adams county, Illinois?

A. Yes, sir.

Q. That was his home at the time of his death?

A. Yes, sir.

52 Q. What minor children were living and at home at the time of his death?

A. Four.

Q. Who was the oldest?

A. Albert.

Q. What was his age?

A. Twenty.

Q. Who was the next?

A. Joseph.

Q. How old was he?

A. Eighteen.

Q. And the next?

A. Herbert.

Q. How old was he?

A. Fifteen.

Q. And the next?

A. Ruth, five years old.

Q. Was Ruth stricken before or after your husband's death?

A. Before his death; a year before his death.

Q. What was the disease?

Mr. Roberts: Defendant objects for the reason that it does not prove or disprove any issue in this case.

53 Mr. Parkinson: It is offered for this purpose: the father in his lifetime was liable for the care and training of this child in her condition and it is proper to show the condition of this child to show what has been the loss by his death and the care and expenses.

The Court: Objection overruled.

To which action of the court in overruling said objection defendant at the time excepted, and still excepts.

A. Infantile paralysis.

Q. What was the little child's condition due to?

Mr. Roberts: I now renew the objection. Defendant objects for the reason heretofore stated.

Objection overruled by the court. Defendant excepts.

A. She had infantile paralysis and was left lame in one foot and is up to this day.

Q. Which limb?

A. Her right foot and leg.

Q. What effect does that have?

A. She is lame. I have to give her rubbings and to pay for medicine in an effort to get her well.

Q. What was the date of your husband's death?

A. The 30th day of October.

54 Q. What year?

A. 1916.

Q. What was your husband's age at the time of his death?

A. Fifty-four years old.

Q. What was the condition of his health?

A. He was in good health.

Q. What medicine did you have to buy for the care of little Ruth?

Mr. Roberts: Defendant objects for the reason that it does not prove or disprove any issue in his case.

The Court: Are you attempting to prove what medicine was actually bought since the death of the father?

Mr. Parkinson: Yes, sir?

The Court: I doubt if that will make a specific recovery.

Mr. Parkinson: It is competent to show the condition of the child and what was necessary to do for it, because this — a loss for what the father would have paid.

The Court: A loss to the child?

Mr. Parkinson: Not to the child but to the widow. The widow on account of the death of her husband sustained the obligation to the child and the legal duty which but for the loss of the husband would have been the obligation of the father.

55

The Court: Well, the objection is overruled.

To which action of the court in overruling said objection defendant at the time excepted, and still excepts.

A. Well, I had one prescription that I had filled and then I had to use alcohol to rub her.

Q. What has been the condition of your health, Mrs. Frese?

A. I have good health.

Q. And what is your age please?

A. Now?

Q. At that time what was your age?

A. Forty-eight.

Q. What wages did your husband earn at that time?

A. I couldn't tell exactly, but from \$90 to \$100 and he was paid twice a month.

Q. You mean \$90 to \$100 each pay day?

A. Yes, sir.

Q. I wish you would look on the back of this check which I hand you and which I have had marked Plaintiff's Exhibit F, I ask you if this is your husband's signature on the back?

A. Yes, sir.

56 Mr. Parkinson: These are introduced as showing the wage checks.

Mr. Roberts: I understand plaintiff produces them or served notice on me to produce them.

Mr. Parkinson: Yes. We offer them in evidence, your honor, at this time.

The Court: Is there any objection.

Mr. Roberts: No.

The Court: There being no objection, the several papers bound together and marked Plaintiff's Exhibit F will be considered in evidence.

Which said Exhibit F is in words and figures as follows, to-wit:

(Owing to the great number of exhibits introduced, said exhibit is printed in separate volume.)

Mr. Parkinson: Mr. Roberts, will you be good enough to give me the papers showing the amount deducted for insurance?

Mr. Roberts: I will get it during the trial.

57 Mr. Parkinson: We offer in evidence records showing the amount deducted from his wages each month, and it will be admitted, Mr. Roberts, that there has been deducted from each month's check an amount for the insurance?

Mr. Roberts: Yes. It is about seventy-five cents a month.

Mr. Parkinson: I understand it is more than that, but you will get it.

Mr. Parkinson: We offer that in evidence, marked Plaintiff's Exhibit G.

The Court: Consider it in evidence.

Which said Exhibit G is in words and figures as follows, to-wit:

(Owing to the great number of exhibits introduced, said exhibit is printed in separate volume.)

Q. What part of his earnings did he devote to the support of his family and minor children?

A. Every cent.

Mr. Parkinson: Take the witness.

Cross-examination.

By Mr. Roberts:

Q. Now, your first daughter, Mrs. Frese, was Helen?

A. Yes, sir.

58 Q. She is married?

A. Yes, sir.

Q. Where is she living?

A. With me.

Q. What does her husband do?

A. He is working for his father.

Q. What kind of work is he doing?

- A. Brickyard work.
Q. His father runs a brick yard over in Quincy?
A. Yes.
Q. And that is Helen's father?
A. Father-in-law.
Q. That is, Helen's husband that works for his father?
A. Yes, sir.
Q. What is his name?
A. Al.
Q. Al what?
A. Hummert?
Q. Have they any children?
A. No, sir.
Q. Helen, at the time of her father's death, was twenty-five years old?
A. Yes, sir.
59 Q. Was she married at the time of his death?
A. No, sir.
Q. When did she marry?
A. About a month later.
Q. She and her husband have lived at your house ever since?
A. Yes, sir.
Q. With you?
A. Yes, sir.
Q. Now, the next child was Selma?
A. Yes, sir.
Q. She was twenty-two years old when her father died?
A. Yes, sir.
Q. Did she marry before your husband died?
A. Yes, sir.
Q. Who?
A. E. G. Kron.
Q. How long before her father died did she marry?
A. About three years.
Q. She married when she was nineteen years old?
A. Yes, sir.
60 Q. Where did she live after she was married?
A. In Tulsa, Oklahoma, and down in New Orleans.
Q. What is her husband's name?
A. He is dead. E. G. Kron.
Q. What does he do.
A. He died. He was salesman for some lumber company, I forget the name.
Q. And where is she living now?
A. She has stayed with me since the death of her husband.
Q. What is the next one—Albert?
A. Yes, sir.
Q. Where is he working now?
A. For the Otis Elevator Company.
Q. Whereabouts?
A. In Quincy.

Q. How long has he been working for them?

A. I think about three years.

Q. Three years?

A. Yes, sir.

Q. What kind of work does he do there?

A. He is in the stock room. I don't know what he does.

Q. Where does he live?

A. Somewhere on Fifty and Madison.

Q. That is he lives in Quincy?

61 A. Yes, sir.

Q. He was twenty years old at the time Mr. Frese died?

A. Yes, sir.

Q. When was he twenty?

A. That May.

Q. May, 1916?

A. Yes, sir.

Q. That was before his father died?

A. Yes, sir.

Q. So that he lacked just a few months of being of age when his father died?

A. From October to May.

Q. Is he married or single?

A. He is married.

Q. And lives in Quincy?

A. Yes, sir.

Q. Then you had a son, Joseph Frese?

A. Yes, sir.

Q. He is now how old?

A. Now?

Q. Yes, sir?

A. He is twenty now.

Q. Isn't he twenty-one?

A. No, not yet.

Q. How soon will he be twenty-one?

A. In May.

62 Q. Where is he working?

A. He is working up at Fort Madison.

Q. What kind of work is he doing?

A. Some rubber tires, or rubber, some rubber company. I couldn't tell you the name; he has just started in lately.

Q. How long has he been working there.

A. About two weeks ago.

Q. Where did he work before?

A. For the Wolf Manufacturing Company.

Q. In Quincy?

A. Yes, sir.

Q. How long did he work for them. Mrs. Frese?

A. Seven months.

Q. Whom did he work for before that?

A. Out to Otis.

Q. For the Otis Elevator Company?

A. Yes, sir.

Q. How long did he work there?

A. About a couple of months.

Q. What I want to get at without bothering you about the details is, how many years has your son been working out?

A. Ever since his father was dead, he worked out.

Q. Did he work before that?

63 A. Yes, sir.

Q. For whom?

A. John Dershier, the barber.

Q. How long did he work for him?

A. Ever since he was fifteen.

Q. When did he get out of school?

A. In 1913.

Q. And has worked since he was fifteen?

A. Yes, sir.

Q. And he is nearly twenty-one?

A. Yes, sir.

Q. Is he single or married?

A. He is single.

Q. The next son was Herbert?

A. Yes, sir.

Q. Where does he work?

A. At the foundry.

Q. What kind of work is he doing?

A. Bookkeeping.

Q. How long has he been a bookkeeper there?

A. About two months ago.

Q. What is his age now?

A. He is seventeen.

Q. Did he go to a business college before he went there?

A. Yes, sir.

64 Q. The Quincy Business College?

A. Yes, sir.

Q. What work did he do after he got out of the business college?

A. He started out at this foundry.

Q. As bookkeeper?

A. Yes, sir.

Q. And is working there now?

A. Yes, sir.

Q. How old is he?

A. Seventeen now.

Q. He lives at home with you?

A. Yes, sir.

Q. He is still working there as a bookkeeper?

A. Yes, sir.

Q. Then the other child is the little girl here in the court room?

A. Yes sir.

Q. Has she been going to school?

A. Yes, sir, she has just started.

Q. How old is she now?

A. Seven.

Q. She walks all right?

A. No, sir, she don't.

Q. I mean she is a little lame, but she walks about?

65 A. She is a little lame but she walks.

Q. She ran around in the court room at the last trial?

A. Oh, yes, she can walk.

Q. She had infantile paralysis many years ago?

A. Four years ago.

Q. And outside of a little lameness she is all right?

A. Yes, sir.

Q. That is all the children?

A. Yes, sir.

Q. Your two oldest daughters are married and their husbands are working?

A. No, one her husband is dead.

Q. Your sons, Albert, Joseph and Herbert, are all working?

A. Yes, sir.

Q. One of them is married and the other two sons are not?

A. Yes, sir.

Q. So the only other child is Ruth?

A. Yes, sir.

Q. Now your husband went to work for the Burlington in April 1888 as a fireman. That is a fact, isn't it?

66 A. I think he worked in the round house first.

Q. He became an engineer in 1889, May 1889?

A. I couldn't tell that?

Q. You were married then?

A. Yes, sir; we were married.

Q. What I want to get at is this: He continued to be engineer from back in 1889 or 1890, along that time, until his death?

A. Yes, sir.

Q. And on the road all the time?

A. He was in the yard a long time and then started on the road.

Q. He has been an engineer ever since?

A. Yes, sir.

Q. Twenty or twenty-five years?

A. Yes, every bit of that.

Q. Now, how long had he been running over this particular line through Hull—I withdraw that. At the time of his death he was running as an engineer on a mixed train between Quincy, Illinois and Lawson, Missouri, wasn't he?

A. Yes, sir.

Q. He got home every other day?

A. Every day.

67 Q. He would leave Quincy in the evening and leave Lawson in the morning and then come home and back that night.

Q. He spent his nights in Lawson?

A. Yes, sir.

Q. And then got home what time?

A. For dinner.

Q. And then go back that night?

A. Yes, sir.

Q. And this town of Hull is on that run?

A. Yes, sir.

Q. Now, how long had he been an engineer on this run, Mrs. Frese?

A. Oh, I think about nine years.

Q. Running through Hull here?

A. Yes, sir.

Q. And you think about nine years?

A. Yes, sir.

Q. He passed through Hull twice a day during that nine years?

A. Yes, sir.

Mr. Roberts: I believe that is all.

Redirect examination.

By Mr. Parkinson:

Q. Mr. Roberts has asked you something about the condition of the little child. Is her limb normal or otherwise? Is it the
68 same size as the other one?

A. No, sir; it doesn't seem to be.

Q. Is it straight?

A. No, it turns out.

Mr. Parkinson: That is all.

The Court: That is all, Mrs. Frese. Call your next witness.

BEN J. WADE, of lawful age, being first duly sworn as a witness on the part of the plaintiff, testified as follows:

Direct examination.

By Mr. Parkinson:

Q. What is your full name please?

A. B. J. Wade.

Q. Where do you live?

A. Hannibal, Missouri.

Q. By whom are you employed at this time?

A. By the Dilbine Brick and Construction Company.

Q. At this time by whom?

A. The Atlas-Portland Cement Company.

Q. How long have you been working for them?

A. Since last August.

69 Q. Whom were you working for before that time?

A. The Dildine Brick and Construction Company.

Q. How long did you work for the Dildine Brick and Construction Company?

A. I had eight years' experience as a draughtsman with them.

Q. Are you related to Mr. Creason?

A. I am a brother-in-law.

Q. Did you make this map?

A. I did.

Q. Does this map correctly indicate the conditions of the track and is it drawn to a scale, at Hull, showing the Wabash and Burlington tracks?

A. Yes, sir.

Mr. Roberts: Before we proceed further. Do you want to offer that in evidence?

Mr. Parkinson: Yes, sir, I am going to later.

Mr. Roberts: I do not want him to refer to things on the plat until I have an opportunity to examine the witness.

The Court: If you wish to examine the witness as to the witness' competency, you may do so.

70 Cross-examination.

By Mr. Roberts:

Q. Were you ever in Hull before October 30, 1916?

A. Yes, sir; I have been through there, and I have been in there, stopped for awhile.

Q. Did you make an examination to get this plat before that time?

A. No, not until the date I made it.

Q. When was that?

A. I have written there. (Indicating the plat.) April 29, 1917.

Q. Are you a civil engineer?

A. No, sir; not a graduate civil engineer.

Q. Did you have a transit with you?

A. No, sir.

Q. How can you determine the angle of two corners without a transit?

A. By measurement.

Q. What is the degree of the angle of those two tracks, the small angle?

A. I never figured that out. It can be done easily.

Q. How is that?

A. I never figured the angle, the degree, but it can be done. Measure down a certain distance through each rail across the tracks.

71 Q. Can you ascertain the angle without a transit?

A. Yes, sir; in degrees.

Q. What is the degree of the small curve between the Wabash and the Burlington?

Mr. Parkinson: We object to that.

The Court: It goes to the competency of the map you are offering in evidence.

Q. What is the degree of the small angle between the Wabash and the Burlington?

A. It isn't in degrees.

Q. I ask you what the degree of that angle is?

Mr. Parkinson: We object to that. He says he doesn't pretend to have the degrees marked there.

The Court: I understand that. Let him say if he knows, and if he doesn't, let him say so.

A. I don't know in degrees, but it is given there. That is a correct degree of that angle.

Q. And yet you don't know the degree?

A. I never figured out the degree.

Q. How can you produce a track on a piece of paper without knowing the degree of the angle and have it correct?

A. By its relation to a triangle.

72 Q. Do you know the degree of the track up there?

A. No, sir.

Q. You do know the means of ascertaining that?

A. Only by measurement.

Q. You can only ascertain the degree or curve by a transit?

A. The actual degree?

Q. The actual degree? Do you claim that this map shows the actual degree of the present track?

A. Not the absolute degree in every point and detail; not the absolute degree, no sir.

The Court: Do you offer the map in evidence?

Mr. Parkinson: Yes, sir.

The Court: Let it be marked Plaintiff's Exhibit H. Consider it in evidence.

To which ruling of the court, defendant at the time excepted and still excepts.

Direct examination.

By Mr. Parkinson:

Q. Mr. Wade, what does this track I am indicating represent?

A. The C. B. & Q.

73 The Court: The record does not show what you are indicating.

Q. I am indicating first a line marked C. B. & Q. R. R. and a second one marked Wabash R. R. What does this square marked "Depot" represent?

A. The depot.

Q. What does this building that I have my pointer on?

A. That is some store building.

Q. What does this indicate?

A. That represents the elevator.

Q. What does this represent?

A. A little engine house.

Q. What does this indicate?

A. A little oil house.

Q. What does this indicate?

A. That is a coal shed.

Q. What does this indicate—never mind. What is the distance of the southwest corner of the depot from the track, measured along a line, the north line—I guess you call that the west line of the depot—How far is it to the track from here to here (indicating)?

A. Seventeen feet and two inches to the corner of the near rail, the first rail.

Q. How far is it—What did you say this represents? 1
74 put the pointer on something marked "coal shed?"

A. That is a little coal shed.

Q. How high is it?

A. I judge it is about—

Q. It is marked here, if you will come and see?

A. 10 feet.

Q. What does this red mark which I indicate, having on it "stop post" south of the C. B. & Q. R. R. Co. track indicate?

A. It indicates where the old stop post originally stood.

Q. First of all, what is the distance from this crossing to the red stop post, the point you have marked "red stop post?"

A. It is 147 feet and 50 feet, that would be 197 feet.

Q. 197 feet?

A. Yes, sir.

Q. How did you locate the point where the stop post had been?

A. It was given to me from a man over there that knew, so he said, at the present time.

Mr. Roberts: We move that be stricken out. The answer shows that the witness doesn't know anything about it.

75 The Court: The objection is sustained.

Q. That was indicated to you as the point where the post was?

A. Yes, sir.

Mr. Roberts: Defendant demands that be stricken out.

The Court: Objection sustained.

Mr. Parkinson: I can prove—

The Court: You may prove it, but not in this way. You may say what that represents on the map.

Q. You are showing on the map where it was indicated to you where the former stop post was?

A. Yes, sir.

Mr. Roberts: I ask that be stricken out, as hearsay testimony.

The Court: I think that is correct.

Q. That represents where it was pointed out to you that the former stop post, and I can show by other witnesses who know that pointed it out.

The Court: That is hearsay testimony. He can state that that represents so far as the map is concerned the location of the old stop post, but the testimony as to what he has heard or has had indicated as the location of the stop post, will be stricken from the record as hearsay testimony.

Q. This does indicate the place where it was indicated to you a stop post stood?

Mr. Roberts: Defendant objects to that on the ground that it is hearsay testimony.

The Court: The witness may state whether that red place there—what that represents. What does it represent?

A. That represents a point where the old stop post was pointed out to me.

Mr. Roberts: Defendant objects and moves that the answer be stricken out for the reason that the witness has disclosed that it is purely hearsay.

The Court: The witness has indicated by this testimony that this is only a point pointed out to him as being the old stop post, and he does not offer in evidence that it was the old stop post. The evidence will be admitted for the purpose merely of explaining the meaning of the red line, the spot referred to on the map. The objection will be overruled.

To which action of the court in overruling defendant's objection, defendant at the time excepted and still excepts.

Q. What does this marked "stop post" that I put my pointer on in black ink indicate?

A. That represents the distance back of the crossing where the stop post now stands.

Mr. Roberts: Defendant moves that the answer be stricken out for the reason that the counsel for plaintiff assured the court that this was a plat of the conditions existing there at the time of the accident.

Mr. Parkinson: I am not asking at this time——

The Court: The answer is stricken out. Ask another question.

Q. What does that indicate and when does it indicate the post was there?

Mr. Robert: Defendant objects to the question for the reason that it is not competent for any purpose. The question is, is this a plat showing the condition at the time of this accident, and any evidence as to condition that existed after the accident is not competent, and does not prove or disprove any issue in this cause.

The Court: Mr. Parkinson, will you prove that the condition as shown by this plat were the same as the conditions that existed at the time of the accident?

Mr. Parkinson: No, sir. We will follow it up and show that this stop post was there at the time this map was made.

We will not show that stop post was there at the time of the injury, but that the stop post at the time of the injury was where the red mark is.

The Court: Why do you claim the competency of that evidence showing a condition that had been changed?

Mr. Parkinson: I am relying in no sense upon the change except to show the conditions where the train was stopped. I am only doing it by reason of their contention that they were required to stop where the red post was, and afterwards moved from this stop post to where you could see along *there* track.

The Court: What, then, does it mark? That was subsequent to this injury?

Mr. Parkinson: I want to show that the stop post *as* the time he was injured, was not at this place. I want to show that the stop post was here (indicating) with a view to show where he was required to stop at the time he was injured.

Mr. Roberts: Defendant objects to counsel's remarks in the presence of the jury. I call the court's attention to the second amended petition, and defendant objects to that remark in the presence of the jury.

79 Mr. Parkinson: And also I may add that I made the remark in response to your honor's inquiry, and for no other purpose except as a response to your honor's inquiry.

The Court: It is contrary to the rules ordinarily to prove any changed condition.

Mr. Parkinson: For the purpose of it is a negligent act?

Mr. Roberts: I call the court's attention to the second amended petition and counsel's statement a minute ago in the presence of the jury.

The Court: Gentlemen of the jury, you may take a recess for a few minutes while we argue a point of law. You may go out in the hall.

Jury retire from the room.

Mr. Parkinson: I say it was the approximate cause of the injury, not the moving one, the fact that they required him to stop and fixed a stop point where it originally was, was an act of negligence in itself, a contributing act of negligence, and one of the many acts of negligence. I am not contending before this court, nor have I stated before this court, that the fact they moved the stop post is evidence of any act of negligence, nor have I so stated to the
80 court or to the jury in the presence of the court.

Mr. Roberts: Defendant now, outside of the presence of the jury, objects to the introduction of any testimony as to where the stop post was after this accident, or any plat that shows where the stop post was after the accident, or any evidence as to the change in the stop post since the accident. If the court is going to permit the evidence to go in, may I consider that the counsel agrees that this objection may be considered to it at all times?

The Court: I think the objection ought to be sustained.

Mr. Parkinson: Plaintiff offers to show that the stop post in black

existed on April 29, 1917, at a distance from the crossing of 147 feet; to be supplemented by evidence that this condition did not exist at the time of the death of Mr. Frese, but that the condition then existed at the time of the death of Mr. Frese was the stop post indicated at the point or red mark 197 feet from the crossing, and that the marks on this map indicate the relative position from the crossing, with a view to subsequently show this condition for the purpose of showing, first, a negligent act in having the stop post located at

81 the map, and for the purpose of showing that the stop post now located at 147 feet from the crossing was not there on the date on which Mr. Frese was killed.

Mr. Roberts: To which the defendant objects for the reasons heretofore stated.

The Court: Objection sustained.

Thereupon the jury were brought back into the room and the following further proceedings were had:

Mr. Parkinson: How far is it, Mr. Wade, from the crossing—and I am talking about the crossing of the right rail—I am talking about the west rail of the C. B. & Q. track and the north rail of the Wabash track—How far is it from the crossing of those two rails to the mark where the track goes around to the Wabash track—the Burlington?

A. 283 feet.

Mr. Roberts: How far?

A. 283 feet.

Q. How far is it from the point marked P No. 2 in red on the C. B. & Q. track to the center line of the crossing of those two tracks?

A. 276 feet.

82 Q. 276 feet. How far is it from the blue mark on the

C. B. & Q. R. R. track P No. 1 to the center of the track crossing?

A. 240 feet.

Q. How far is it from the center of the track crossing or from the point where the north rail of the C. B. & Q. track and the north rail of the Wabash track, from there to a point in red marked P No. 2 on the Wabash track east of the crossing?

A. 190 feet.

Q. How far is it to the point in blue marked P No. 2 from the same point?

A. 115 feet.

Q. How far is it from the same point of the crossing on the railroad tracks to the point marked P No. 2 in red, east of the Wabash crossing?

A. The sum of 109 feet and 88 feet.

Q. How much is that?

A. 197 feet.

Q. How far is it from the same point on the crossing east along the Wabash to the place in blue marked P No. 2?

A. The sum of 115 feet and 122 feet, 237 feet.

Q. How far is it from the crossing, that is, the east C. B. & Q. or north C. B. & Q. rail where it crosses the south Wabash rail, and the south rail of the Y track that runs around from the C. B. & Q. track to the Wabash track?

A. 281 feet.

Q. How far—What does the red point marked "Stop Post" on the Wabash track indicate?

A. That is the point pointed out to me where the stop post was at the time of the accident?

Mr. Roberts: Defendant moves that the answer be stricken out.

The Court: That is stricken out. What does that line indicate.

Q. Was there anything there at the time you were there?

A. No, sir.

Q. The point that is marked there "stop post" in red, what is the distance that is from the—well, from the crossing, some part of the crossing, I don't know which?

A. The sum of 198 feet and 117 feet and 4 inches.

Q. How many?

A. 198 feet.

Q. Where is that mark from here to here, and from here to here? the sum of 198 feet and what?

A. 117 feet and 4 inches.

Q. And then is there any other distance to be added?

A. No, sir.

Q. That is correct?

A. Yes, sir.

Q. That line runs through there?

A. Yes, sir.

Q. Those are the connecting lines? I see—in red. What is the distance along the west line to the depot from the north and east Burlington rail to the south rail of the Y along the line extended along the west side of the depot?

A. You mean the distance between the two rails?

Q. Yes, sir.

A. The sum of 17 feet and 2 inches, 24 feet and 2 inches and 15 feet.

Q. What is the length of the depot?

A. 52 feet and 6 inches.

Q. What is the distance along a line drawn along the east line of the depot from the southwest corner of the depot to the north Wabash track?

A. 23 feet.

Q. What is the distance drawn along the line of the east end of the depot from the northeast corner of the depot to the south & track?

A. 15 feet.

Q. What is the distance of the elevator from the north end of the Wabash track to the center line of the elevator?

A. 49 feet and 6 inches.

Q. What is the distance along the west line of the elevator from the north rail of the Y track to the south line of the elevator?

A. 9 feet and 2 inches.

Q. What is the length of the coal shed?

A. 64 feet.

Q. What is their width?

A. 12 feet.

Q. What is the — from the north end of the coal shed—It isn't set exactly parallel—to the Wabash track?

A. No, sir.

Q. What is the distance along the west line of the west end of the coal shed from the north Wabash track to the coal shed?

A. 31 feet.

Q. What is the distance from the point indicated on the Wabash tracks "stop post" in black east to the crossing on the Wabash?

A. 198 feet.

Q. That is the one in black?

A. Yes, sir.

86 Q. Did you have any one—well, I will recall that. That is all.

Q. Did you make a test in engine 1054 with reference to the line of vision, or what could be seen by a man standing and sitting on the engineer's side in the cab of that engine?

A. I did.

Q. State to the jury whether or not from the engineer's side of the engine, if he was standing in the cab of the engine or sitting in the cab of the engine on the engineer's side, you could see across to the depot to the fireman's side of that engine—

A. You mean was the fireman—

Q. —see anything on that side?

A. He had no view out across through that engine, right up to the depot is all.

Q. Could you see anything approaching, any other train, or anything?

A. No, he had no view out through the window.

Q. Did you have any view out the front over the top of the engine?

A. No, sir.

Q. Did you make an absolute test of that?

A. Yes, sir.

Q. When did you make that test with that engine No. 1054, and where?

87 A. I don't remember the date exactly, but it was some time after the accident and after that map was made. And it was along the C. B. & Q. track. The train ran southeast and it was stopped there, and I boarded the engine and ran down past the crossing.

Q. At Hull?

A. At Hull station.

Mr. Parkinson: Take the witness.

Cross-examination.

By Mr. Roberts:

Q. When was that?

A. It was subsequent to the accident, and after that map was made.

Q. Before you testified at the last trial?

A. I don't remember the date.

Q. Wasn't it before you testified at the last trial? How soon after you made this map were you on the engine?

A. It wasn't very long.

Q. About how long?

A. I wouldn't want to set any date at all.

Q. You remember testifying in this court room on the former trial of this case?

A. Yes, sir.

88 Q. Will you tell the jury whether or not it was before or after that trial?

A. I won't say positively.

Q. Was it the time you took photographs of that engine?

A. It was later.

Q. And you don't know whether it was since the last trial of this case?

A. No; I wouldn't say positively.

Q. Who was the engineer?

A. I don't know what his name was.

Q. Who was the fireman?

A. I don't know what his name was.

Q. Will you give us the month it was?

A. I can't do it positively.

Q. How did you happen to go over there?

A. I was asked to go over.

Q. Who asked you?

A. Mr. Creason.

Q. Your brother-in-law back there?

A. Yes, sir.

Q. When did he ask you?

A. I don't know.

Q. What year would you say?

A. I wouldn't say about that positively.

Q. You are a draughtsman, are you?

A. Yes sir.

89 Q. And you don't remember the year you were over there?

A. Yes, sir; I remember when I was over there, 1917.

Q. Was it the first or last part of 1917?

A. It was in April.

Q. In April 1917 that you were on that engine?

A. No, sir.

Q. I am talking about the time you were on the engine?

A. I don't know.

- Q. You don't remember the year?
A. I never put it down.
Q. You have some independent memory of things, don't you?
A. Yes, sir. It was either in 1917 or 1918.
Q. You don't know whether it was last year or the year before?
A. No, sir.
Q. Was it summer or winter?
A. It was in the summer.
Q. Was it last summer or a year ago last summer?
A. I wouldn't say positively.
Q. You don't know?
A. No, sir.
90 Q. And can't remember?
A. No, sir.
Q. You can't give this jury any idea?
A. No, sir.
Q. Do you know when engine No. 1054 quit running over that run?
A. No, sir.
Q. That is the reason you don't remember?
A. No, sir.
Q. Will you please tell the jury whether it was in summer of 1917 or last summer that you went into that engine, as you say?
A. I can't do it. I have nothing to remember it by.
Q. Who were you working for at that time?
A. Dildine Brick and Construction Company.
Q. Were you working for them in 1918?
A. Yes, sir.
Q. In 1917?
A. Yes, sir.
Q. Where did you go from to go over there?
A. From Hannibal.
Q. What time in the morning did you go?
A. I don't know whether it was in the morning or not.
91 Q. You don't remember what time of the day you went over there?
A. No, sir.
Q. What train did you take?
A. I don't remember that.
Q. How did you go over.
A. On a train.
Q. Was it a freight train or passenger train?
A. A passenger train.
Q. You don't remember the time of day?
A. No, sir.
Q. Were you there when Mr. Creason took the photographs of that engine?
A. Yes, sir.
Q. Was that the time you rode on it?
A. No, I don't think that was the time.
Q. You are not certain about that, are you?

A. No, sir. I made several trips over there.

Q. How many trips did you make over there for Mr. Creason?

A. I made several trips.

Q. What was the purpose of those several trips?

A. To get measurements and do other work I was asked to do.

Q. What time in the day did you go on this engine?

92 A. I will not say positively, but I believe it was in the afternoon some time.

Q. About what time?

A. I couldn't say. I don't know what time it was.

Q. What train did you take over there?

A. Well, I don't know on this trip.

Q. What train did you take leaving there?

A. Same train out in the evening. I don't know what the times are.

Q. Where did you go on the engine?

A. When it stopped back up north of the Wabash.

Q. What did you do when you got on?

A. I spoke to the engineer.

Q. Did you know him?

A. No, not personally.

Q. Did you know him otherwise?

A. Well, no, he wasn't—

Q. What was his name?

A. I can't recall it.

Q. Did you know the fireman?

A. No, not at that time.

Q. You climbed up in the engineer's seat, did you?

A. Yes, sir; I was talking to him.

93 Q. You don't know when it was, whether last year or the year before?

A. I wouldn't say positively.

Q. And you claim you couldn't see over the boiler of that engine on the engineer's side? Is that what you claim? You claim the engineer sitting in his seat couldn't see over the boiler.

A. Yes, sir. There was some space between the boiler and cab of the engine.

Q. He could see on the left hand side?

A. Of the engine? Yes, sir.

Q. Do you know how much of a space there is?

A. I should judge not over twelve or fourteen inches.

Q. Is that photograph marked Defendant's Exhibit No. 1, I am handing you, a fair photograph of the engine?

A. Yes, sir; that looks like the engine.

A. A good photograph of it, is it?

A. It looks like the engine.

Q. That is all. Now, did you stand—Do you know where a point 197 feet from the crossing is on the Burlington track?

A. I know about where it is.

Q. Do you know where the section house is?

A. Yes, sir.

94 Q. Little tracks lead to the section house?

A. Yes, sir.

Q. Do you know where the bunk car is right north of that?

A. Yes, I remember it setting there.

Q. You didn't show those on that map?

A. No, sir.

Q. Why?

A. I wasn't requested to show those.

Q. You were not requested to show those, I see. Did you show the street that is back here?

A. No, sir.

Q. There is a shed or building back in here?

A. Yes, sir.

Q. You didn't show those on this map?

A. No, sir.

Q. Now, where is the south end of that bunk car? How far is it from the crossing, the middle of the crossing, to the south end of that bunk house by the C. B. & Q. track?

A. I don't know. I never measured it.

Q. Did you measure to the north of it?

A. No, sir.

Q. Did you measure to the section house?

A. No, sir.

Q. Do you know the degree of this curve in here, the angle?

95 A. The degree formed by the triangle 50 feet on each side.

Q. What is the degree of that?

A. That is the angle formed.

Q. Can you give me in degrees and minutes the angle?

A. No, sir; I can't but that angle will be the same wherever it is with those measurements. I never put it down in degrees and minutes.

Q. Give it to us now? What is the degree of that angle? How many degrees is the small angle?

A. No, it is quite a little problem to figure that out.

Q. The accuracy of that plat all depends in getting the proper degree?

A. That is the proper degree. Those measurements will give it absolutely.

Q. Can you give us the degree of that angle there?

A. It can be figured out from those measurements.

Q. Well, figure it out?

Mr. Parkinson: We object to that.

Mr. Roberts: That is a very crucial point in this case, your honor.

96 The Court: It is cross examination. If you can figure it out, do so.

A. It will be some little problem without any tables, but these measurements will prove that angle is correct in degrees and minutes.

Q. That is not the question I asked you?

Mr. Parkinson: We object to the witness figuring out problems for Mr. Roberts. The witness is not required to make mathematical calculations.

The Court: The witness has been asked if he can give that angle in degrees and minutes.

Q. Can you?

A. It can be done.

Q. Can you do it?

A. No.

Q. You can't?

A. I will be glad to do so——

Q. Will you give it to me now?

A. No, it will take too long.

Q. Now, don't you know, Mr. Wade, that to have an exact plat showing the view at different points, and to produce that on a plat you must have the exact degree of the angle?

A. That is it exactly.

Q. What is the degree of this,—a right angle?

97 A. It doesn't have to be on the plat in degrees and minutes.

Q. What is the degree of this large angle, do you know?

A. No, sir.

Mr. Parkinson: We object to that. He has said that is an accurate map and the degrees are not given.

Q. Do you know the degree?

A. No, sir.

The Court: He has said he doesn't know the degree, and can't give it.

Q. I know, but the jury didn't hear it because Mr. Parkinson was objecting and they couldn't hear it. Now, with reference to the section house or that bunk car that is not shown on here. Where is the 197 feet away from the house along the Burlington?

A. I don't know.

Q. Is it north or south of the section house?

A. I couldn't say. I took no measurements of anything with reference to that except the stop post.

Q. Mr. Creason took the measurements on this side?

A. He may have; I don't know.

98 Q. And you left that to Mr. Creason, some of those measurements, did you?

A. No, sir, none that is on there.

Q. Well, now, do you know how far the platform of the depot extends out that way?

A. No, sir, I don't.

Q. How?

A. No, sir.

Q. You don't know anything about that?

A. No, sir.

Q. That platform is not shown on here?

A. No, sir.

Q. Do you know how far it extends this way?

A. No, sir.

Q. Do you know the degrees of this transfer track?

A. No, sir; not in degrees.

Q. Now, how high—You sat on that engine on the engineer's side, and how high is your face above the ground when you are sitting in that engine?

A. I should judge about eight or ten feet.

Q. I want to ask you if it is not eleven feet?

A. I don't know. That is just my judgment. I have not any way of knowing, only my judgment is it is ten feet or something like that.

99 Q. Were you on the fireman's side?

A. No, sir.

Q. You don't know what view the fireman had?

A. No, sir.

Mr. Roberts: That is all.

Redirect examination.

By Mr. Parkinson: So the jury can understand you. Is there any question about the degree of that being shown there? -

A. No, sir.

Q. Is there any necessity of having a transit to show the degree of the angle?

A. There is none.

Q. And those measurements are absolutely correct?

A. Yes, sir.

Mr. Roberts: Defendant objects to counsel leading and suggesting to the witness what kind of answer he desires.

The Court: Yes, don't lead the witness, Mr. Parkinson.

Q. Are those measurements you have given absolutely correct?

A. Yes, sir.

100 Q. What is the distance of this Y track where it leaves the rail of the Burlington, the south rail, to where it ran into the Wabash?

A. 547 feet along the rail? From the point of the frog to the point of the frog.

Recross-examination.

By Mr. Roberts:

Q. You testified in the last trial of this case?

A. Yes, sir.

Q. And prior to that trial you had been over to Hull several times?

A. Yes, sir.

Q. And you testified that you helped take photographs of that engine?

A. Yes sir.

Q. You never testified at that trial that you were up in the engine?

A. I don't know whether I did or not.

Q. Can I refresh your memory by your testimony?

A. Probably so.

Q. You have read your testimony given at the last trial recently, have you not?

A. I have not.

Q. You looked it over?

A. I have not.

101 Q. Can you state whether you testified you were on that engine?

A. No, sir.

Q. You don't know?

A. No, sir.

Q. You have seen the transcript of your testimony?

A. No, sir. I have had no reference whatever to this since the last trial.

Q. Now, I am handing you a photograph marked Defendant's Exhibit No. 2. State whether that is a fairly accurate photograph looking to the southeast?

A. Yes, sir; that looks natural.

Q. I hand you a photograph marked Defendant's Exhibit No. 4. Is that a fair and accurate photograph of the situation out there at Hull looking to the southeast?

A. Yes, sir.

Q. I hand you a photograph marked Defendant's Exhibit No. 3. Is that a fairly accurate photograph of the situation out there looking to the south east of the Burlington tracks?

A. Yes, sir.

102 Mr. Roberts: In connection with the cross examination of this witness defendant offers in evidence Defendant's Exhibits No. 1, No. 2, No. 3 and No. 4.

The Court: Any objection, Mr. Parkinson.

Mr. Parkinson: I don't know, your honor. He has not handed them to me.

Redirect examination.

By Mr. Parkinson:

Q. Whether these pictures, or whether or not the tracks are the same on February 15, 1919, that is, a few days ago, as they were at the time you saw them, you don't know?

A. No, I wouldn't say as to that.

Q. Whether these tracks have been moved or not you don't know?

A. No.

Q. In a general way the tracks are the same?

A. Yes, sir.

Mr. Roberts: Defendant objects to counsel leading and suggesting to the witness the answer.

Q. State whether or not those tracks in a general way are the same.

A. Yes, sir, in a general way.

Q. But whether they are the same, in the exact location, you can't say?

A. No, sir.

103 The Court: Don't lead the witness, Mr. Parkinson. That is objectionable.

Q. At the last trial of this case the defendant had some photographs taken closer to the time the accident happened, did it not?

A. I think so.

The Court: Defendant's Exhibits No. 1, No. 2, No. 3, No. 4 and No. 5 are considered in evidence.

Witness excused.

(Owing to the great number of exhibits introduced, said exhibit is printed in separate volume.)

J. R. LESLIE, of lawful age, being first duly sworn as a witness on the part of the plaintiff, testified as follows:

Direct examination.

By Mr. Parkinson:

Q. State your name.

A. J. R. Leslie.

Q. Mr. Leslie, did you go over to Hull the other day to make some measurements?

A. Yes, I was out there last Saturday.

Q. For the Burlington Railroad Company?

104 A. Yes, sir.

Q. You don't know whether the conditions there correspond to what they were back in 1916, in October, do you?

A. No, sir.

Q. Mr. Leslie, will you look at this map. If you were given the base of a triangle and the two sides of the triangle can you sett the degree of the angle?

A. Oh, yes.

Q. Will you please do it for us, with this one. The two sides are 50 feet each and the base is 36 feet and 10 inches. Give us the degree and state if it can be done?

A. You must have one angle——

Q. If you have the two sides and the length of the base of the triangle, can you tell the angle?

A. I would have to have all three lengths.

Q. The three sides of the triangle?

A. Yes, I can tell that angle from this.

Q. If on this map the dimensions are given correctly, the angle is bound to be correct, if drawn to a scale, if the correct measurements are given?

A. Oh, yes.

Q. And it doesn't need a transit in order to tell the angle?

105 A. It would take very accurate measurements to ascertain that angle.

Q. I asked you if it would take a transit to do it?

A. Theoretically yes. From those distances the angle could be taken, but it is not in the ordinary way.

Q. You would use a transit?

A. Yes, sir.

Q. And it is much easier?

Q. You would take a transit and get the distances?

A. Yes.

Q. But you can have the distances given and draw an accurate map?

A. In some cases, yes.

Q. You couldn't miss it when you have sufficient data?

A. If you had enough measurements and in the right shape, you couldn't.

Q. If you drew it to a scale and had two scales each 50 feet and the base 36 feet and 10 inches—if they were drawn to a scale it would have to be correct.

106 A. Theoretically, it should be correct, but in case of that kind it would be hard to get accurate measurements on account of the roughness of the track caused by trains running over them.

Q. The trains change the track?

A. Yes.

Q. Then in two years the tracks wouldn't be in the same condition?

A. No, taking trains running on the track. These are sometimes out of alignment an inch.

Q. It might change in a month or two?

A. There would be a slight variation.

Q. And in a couple of years, it would be considerable?

A. Yes, sir.

Q. That is the reason you said it wouldn't be correct?

Q. You made a map. Where is that?

A. On the table.

Q. Will you give it to me please?

The Court: Let it be marked Plaintiff's Exhibit I.

Q. To what scale is that drawn?

A. Each inch, 100 feet.

Q. Tell us the distance between this rail along the east side of the depot to the southwest corner of the depot?

Mr. Roberts: What are you referring to now?

107 Mr. Parkinson: I am asking about the north rail of the track marked C. B. & Q. to the southwest corner of a point marked "depot." Tell us the distance?

Mr. Roberts: I want the distance to refer to the map he is referring to.

The Court: He is referring to Plaintiff's Exhibit I.

Q. Along the line of the west side of the depot?

A. 16.5-10 feet.

Q. Will you give me what you have there?

A. Yes.

Q. Get it so it will be along that line?

A. That is what it is.

Q. Now, what do you make the distance to be?

A. 16 5-10 feet.

Q. On the ruler?

A. 16 5-10.

Q. Now, will you give it to us along the east line to the north rail of the Wabash track from the same corner?

A. That is 19 feet along the Burlington to the line east of the depot.

Q. Now, does this map show the high obstacles on the east side?

108 A. You mean on the east? You are pointing to the west.

Q. On the south and west side of the C. B. & Q.?

A. Yes, sir, the high buildings in there.

Q. Is there any stop post indicated on that map?

A. No, sir. There is a stop post on the ground.

Q. Did you take a measurement of it?

Q. Yes, sir.

Q. What is the distance from the frog at this time of the C. B. & Q. track and the south rail of the Y track, and the frog on the Wabash?

A. I don't quite understand you, Mr. Parkinson.

Mr. Parkinson: I want to ask one more question. Are you able to say that this map which is marked Plaintiff's Exhibit I,—are you able to say that map does not correctly represent the conditions existing in April 1917 and on October 1916 the conditions of the track and depot and everything at Hull?

Mr. Roberts: Defendant objects for the reason that the question is as to the conditions on the day of the accident, and this witness has disclosed that it does not.

109 Mr. Parkinson: I am asking if he is able to say that this map is incorrect in any particular?

The Court: Objection overruled as to Exhibit No. 1.

Mr. Parkinson: I am asking about the map. Are you able to say or point out anything incorrect there, as it existed on October 1916 or April 1917?

A. I never was at this place except once and that was last Saturday.

Q. Are you able to tell from any measurements, as an engineer, any inaccuracy from that map.

A. Standing here looking at it, I couldn't tell whether there is any inaccuracy.

Q. Will you examine it?

A. The only way I could test its accuracy would be to take measurements and see whether it would correspond to them.

Q. Will you do that?

A. It will take quite a while.

Q. Oh, it will take you as an engineer quite a while?

A. It would take a half an hour or more to see whether it is correct or not.

Mr. Parkinson: Take the witness.

110 Cross-Examination.

By Mr. Roberts:

Q. You were there at Hull the other day, were you, Mr. Leslie?

A. Yes, sir, last Saturday.

Q. Do you recall a point 197 feet on the Burlington track from the crossing of it and the Wabash track?

A. Yes, sir.

Q. Did you stand opposite that point at this rail, I mean the east rail of the Burlington track, and look to the southeast?

A. Yes, sir.

Q. Did you see the elevator there?

A. Yes, sir.

Q. Now, when you were at Hull the other day, you saw the depot there?

A. Yes, sir.

Q. Did it look like an old or new building?

A. I judge it is an old building.

Q. Did you see a coal shed there at the northwest of that building?

A. Yes, sir.

Q. Did it look like an old or new building?

A. It looked like an old one. In fact, all the buildings were old.

Q. Did you see the transfer track there?

111 A. Yes, sir.

Q. Which side was it?

A. Northwest.

Q. What is the general direction of the C. B. & Q. along there?

A. Northwest to southeast.

Q. And the Wabash track, what is its direction?

A. Due east and west.

Q. Did you station yourself at a point 197 feet from the middle of this crossing to the northwest on the C. B. & Q. track?

A. Yes, sir.

Q. Did you stand on the left rail, near the left rail, looking south?

A. Yes, sir.

Q. State whether or not at that place, you could see a train on the Wabash track, if there had been one there?

A. Oh, yes; yes, sir.

Q. Now, Mr. Leslie, if the point of the pilot of an engine such as this one in the photograph that has been introduced in evidence here,—if the point of the pilot of that engine was at a point 197 feet from this crossing, about how far in your judgment would the fireman be back of that?

112 A. He would be somewhere around 16 to 18 feet further than that.

Q. To the north?

A. Yes, sir.

Q. Did you stand at that point and ascertain whether you could see a train on the Wabash track and north of that station?

A. Yes, sir.

Q. Could you?

A. Yes, sir.

Q. Do you know whether in fact two photographs were taken from this position when you were there?

A. Yes, sir; one from each of these. However, I have the dimensions and position from which the photographs were taken designated on my map. So as to be certain as to the number of them I would like to refer to that map.

The Court: You can do it.

Mr. Roberts: In a general way, I ask you if defendant's Exhibits No. 2, No. 3, and No. 4 are fairly accurate photographs from that point 197 feet and north thereof? Take time to look at them?

113 A. Yes, these photographs represent that exactly there. I was on the ground at the time they were taken, and these are now the same photographs from three different points there.

Q. Now, Mr. Leslie, did you notice the section house there close to the C. B. & Q. tracks?

A. Yes, sir.

Q. And did you notice a bunk car there?

A. Yes, sir.

Q. Right directly north of it?

A. Yes, sir.

Q. How far is it from the middle of this crossing to that section house? You may refer to your notes, if you wish?

A. I have the distances marked on the map and I may have forgotten some of them.

Q. Could you refer to your notes?

A. The notes are all on that map.

Q. You may refresh your memory from anything you have?

A. Is it all right for me to look on the map?

The Court: Any data or memorandum you may have is all right.

Q. How far is it, Mr. Leslie, from the point in the middle of this crossing to a point up on the C. B. & Q. track, in the middle of the track opposite the site of the little section house?

A. 186.8 feet.

114 Q. How far to the north side of the section house?

A. 197 feet.

Q. How far is it to the south end of the bunk house?

A. 209.5 feet.

Q. 209.5 feet?

A. Yes, sir.

Q. What is the length of that depot?

A. 52½ feet, I think.

Q. What is the width of it?

A. 21.8 feet.

Q. What are the dimensions of that coal house directly north of the depot?

A. 7 x 14 feet.

Q. Now, is there any other building between the transfer track and the Wabash track except the depot and the coal house?

A. No, sir.

Q. Where is that coal house located, as you saw it there?

A. The north end of the coal house is 127 feet north of the center of the crossing measured up the track.

Mr. Parkinson: Which end?

A. The north end.

Q. How much did you say?

115 A. 127 feet.

Q. That is the north end of it?

A. The coal shed on the east side of the Burlington track there.

Q. As you approach south on the C. B. & Q. track, suppose a man was approaching on an engine, where is the view cut off so you cannot see the train on there?

A. The most southerly point?

Q. Yes?

A. That would be 127 feet north of the center of the crossing.

Q. After leaving that point 127 feet north of the center of the crossing, can you see the train on the north side of the depot?

A. Coming southerly on that point?

Q. Yes?

A. No, sir; the view is shut off by the depot then.

Q. He can't see anything at all until he gets by the depot?

A. No, sir.

Q. I am handing you Defendant's Exhibit No. 21, Defendant's Exhibit No. 23 and Defendant's Exhibit No. 24. Now look at those photographs introduced by the defendant at the last trial of

116 this case and were so marked by the stenographer of this court at that time. Are those fairly accurate photographs of the situation as shown there?

A. Yes, sir.

Q. Do you see any changes there from when you were there?

A. Nothing in the looks of the buildings.

Q. That is what I am talking about?

A. Yes, sir; they are the same.

Mr. Roberts: Defendant offers those photographs in evidence in connection with the testimony of this witness.

Mr. Parkinson: We object to them because they are introduced out of order.

The Court: Objection overruled. They are admitted in evidence as a part of the cross examination of the witness.

Mr. Roberts: Now, your honor, these are the photographs that were introduced by the defendant at the last trial.

Mr. Parkinson: You mean that is all?

Mr. Roberts: All but one. We will introduce that later. I think

80.

Mr. Parkinson: We want all of them.

Mr. Roberts: That is all.

(Owing to the great number of exhibits introduced, said exhibit is printed in separate volume.)

117 Q. Now, Mr. Leslie, is that a fairly accurate photograph looking down from the Wabash side, I show you Defendant's Exhibit No. 5.

A. Yes, that is all right.

Q. Do you know the distance of the camera that it was taken from?

A. No, I don't on this photograph, No, sir.

Q. Now, referring to Plaintiff's Exhibit I, about which you testified a while ago, is that an accurate map of the situation there, as you took it the other day?

A. Yes, sir.

Q. Does it show the correct angle of the railroad track?

A. Yes, sir.

Q. Does it show the obstructions between the two tracks and the transfer track?

A. Yes, sir.

Q. What are those buildings in there?

A. The coal bin and the depot.

Q. Does it show the bunk house?

A. Yes, sir.

Q. Does it show the section house?

A. Yes, sir.

118 Q. Will you indicate to us where the point 197 feet from the crossing of the two tracks, where is it in there?

A. The south end of the bunk house?

Q. 197 feet up this track here, indicate to us where it is?

A. Right there. (indicating) In other words, it is right opposite the north side of the section house.

Q. What is this point here No. 2?

A. 209.5 feet north of the center of the crossing.

Q. What is this point here?

A. That is 227.5 feet north of the crossing of the depot, the point from which the photograph was taken.

Q. This was from the depot platform?

A. Yes, sir.

Q. This is the elevator?

A. Yes, sir.

Q. Does it show some store buildings?

A. Yes, sir.

Q. How high are those store buildings and the barber shop?

A. Two stories.

Q. How high is the elevator?

A. Probably 50 feet in the high part of it.

Q. How high is the depot building?

119 A. Just one story with an angling roof on it, probably 12 feet to the eaves of it and then the roof higher than that.

Q. To the top of the roof how high?

A. 22 feet I expect.

Mr. Roberts: Defendant offers in connection with the cross-examination of this witness Plaintiff's Exhibit I.

Mr. Parkinson: We object to it at this time.

The Court: Objection overruled.

(Owing to the great number of exhibits introduced, said exhibit is printed in separate volume.)

Redirect examination.

By Mr. Parkinson:

Q. Does that picture fairly represent the condition—I am handing you Plaintiff's Exhibit J—does that picture fairly represent the conditions there?

A. Yes, I think so, Mr. Parkinson.

Q. That is a very fair representation, is it?

A. That is looking southerly and along the Burlington right of way.

120 Q. Does that picture, Plaintiff's Exhibit K, does that fairly and accurately show the conditions there?

A. Yes. That is taken looking south on the Burlington track.

Q. Does it show a stop post?

A. Yes, sir.

Q. Does it show the section house?

A. Yes, sir. That is the section house and that is the bunk house.

Q. These do not in any way impede a view over on the east side of the track, do they?

Mr. Roberts: Now, wait a minute.

Mr. Parkinson: I offer them in evidence at this time.

Mr. Roberts: Defendant objects to these photographs being introduced in evidence because they do not show on the face of them the conditions at the time of the accident. The pictures introduced do they show the same conditions as these?

Mr. Parkinson: No, sir.

Mr. Roberts: He tries to admit the section house and the bunk house.

Mr. Parkinson: I protest against such a statement as that before this jury. Your honor knows the conditions and that I am not trying to hide anything.

121 The Court: Yes. Well, hold up those photographs for the present, Mr. Parkinson.

Mr. Parkinson: We want to show them before this man leaves the stand. They may show the respect in which they differ.

The Court: Then show the respect.

Q. To show the different condition, as stated, we offer those pictures in evidence. If they put a flag there or anything and then say we could not introduce them in evidence for that reason, that would indicate subterfuge, your honor.

The Court: Ask the question.

Q. That shows the situation exactly as you saw it the other day?

A. That is, the depot and the things around there, but I couldn't say—

Q. Except for that stop post, consider that out of it, that stop post. Now, does it show the situation as it was?

A. Yes, I think it shows as it did the other day when I was there.

The Court: Admit the offer in evidence, except as to showing the stop post.

Mr. Roberts: Defendant objects for the reason that the photographs do not show condition on the day of the accident, and because there is no evidence that they do show the conditions on the day of the accident.

122 The Court: The objection will be overruled on the statement of counsel that there is no difference in that picture except the stop post. As to the stop post in this picture, that part will not be considered by the jury.

To which ruling of the court defendant at the time excepted and still excepts.

Q. Each one of those marks represents 10 feet?

A. Yes, sir. 10 feet, on my map 10 feet and 12 feet on yours.

Q. That is correct. Now, please step down here. What I want is 197 feet measured along your map here?

(Witness indicates same on map.)

Q. What I want the jury to understand is this: Is this a perfect circle that you have swung around here?

A. That is tangent at all points but it isn't the same degree of curvature in its entire length.

Q. Where did you get that?

A. By measurements.

Q. Where did you get those measurements?

A. I located that curve from the center of this crossing.

123 Q. Where did you measure it to give you this?

A. One here on this point and three others. Down here and one up there.

Q. You got this point over here?

A. Yes, sir.

Q. Did you get it at an exact angle?

A. No, sir.

Q. How?

A. I measured that to a certain point?

Q. What was the measurement please?

A. 56 and some tenths of a foot, I think.

Q. Have you that measurement?

A. It is there on the map.

Q. You measured here 44 feet?

A. Yes, sir.

Q. And here 50 feet?

A. 56 and something.

Q. And you got this point located and took two others points up here?

A. Yes, sir. I took my transit and ran around that curve.

Q. When at no place is there a true circle, you had to rely on measurements?

A. Yes. It is a true curve.

Q. You mean on that map you have shown it a true curve?

124 A. It is on the ground. It is between these two pencil marks approximately as I have placed it on the map.

Q. In this picture. I will take the first picture. In this picture you didn't measure where the camera was?

Mr. Roberts: What picture are you referring to?

Q. I am talking about Defendant's Exhibit No. 2. You don't know where the camera was placed for this, do you?

A. Yes, I was there when the camera was set up and the three pictures were taken.

Q. Did you make the measurements?

A. Yes, sir, to the camera.

Q. That picture was taken in there?

A. Yes, sir.

Q. What is the distance between the track, as shown in the picture, and the coal house?

A. Well, of course, you can't tell from the picture. I will have to tell from the map.

Q. It shows the width of the coal house and the width from the track?

A. Yes, sir.

Q. What is it?

A. The easterly rail of the transfer track?

Q. Yes, sir?

125 A. That coal house is 7 feet. This is a very poor way to estimate distances by looking at photographs. It is simply a guess.

Q. You think it is 7 feet?

Mr. Roberts: Get it exactly, will you?

A. You mean the north end?

Q. Yes, sir? Is there any difference in the ends?

A. There may be. I measured the south end and I estimated the building was square, and I measured the two sides of it.

Q. That was 14 feet this way?

A. I think so. Yes, that is 14 feet.

Q. So on your map you say at this side it is 7 feet and 7.4 feet at the other side?

A. That is right.

Q. Whether it is 7 or 7.4 you didn't measure to see?

A. Yes, sir.

Q. You measured this end?

A. Yes, sir. I assumed that the building was square.

Q. You don't pretend to say that this end was not 7.4 feet?

A. No, sir. I assumed the building was square.

Mr. Parkinson: That is all.

126 Mr. Roberts: That is all, Mr. Leslie.

Mr. Roberts: In connection with this cross examination I believe I did offer Plaintiff's Exhibit I.

The Court: I waited until there was supplemental evidence showing the conditions at this time. On there statement that they will supply the evidence, the objection will be overruled. Consider Plaintiff's Exhibit I in evidence.

(Owing to the great number of exhibits introduced, said exhibit is printed in separate volume.)

Mr. Parkinson: I offer in evidence the deposition of Mr. M. A. Long taken in this case.

Mr. Roberts: No objection.

Mr. Parkinson (reading):

M. A. LONG, being produced, sworn and examined on the part of the plaintiff, deposeth and saith as follows:

Direct examination. |

By Mr. Wilcox:

Q. State your name?

A. M. A. Long.

127 Q. What is your residence?

A. Springfield, Illinois.

Q. What is your age?

A. Thirty-four.

Q. By whom, if any one, are you employed?

A. The Wabash.

Q. In what capacity?

A. Engineer.

Q. How long have you been with the Wabash as engineer?

A. Ten years.

Q. How long have you been running out of Springfield?

A. Ten years.

Q. What direction do you run from Springfield?

A. Either way, east or west.

Q. When you run west what is the end of your division point?

A. Hannibal.

Q. Q. I will ask you whether or not on your run from Springfield to Hannibal you pass the town or station of Hulls, in Illinois?

A. Yes, sir.

Q. Were you acting as engineer for the Wabash on the 20th day of last October?

128 A. Yes, sir.

Q. Did you make any trips out of Hannibal that day?

A. No, sir.

Q. Did you make any trips out of Springfield that day?

A. Yes, sir.

Q. What time did you leave Springfield that day, if you recall?

A. I don't remember what time I was called for; along about 11 o'clock; 10:30 or 11.

Q. What kind of a train did you take out, freight or passenger?

A. Freight.

Q. Regular, or extra?

A. Extra.

Q. Do you know the number of it?

A. I know the engine, 2318.

Q. What did that train consist of—about how many cars, if you know.

A. I believe, from what I remember, we had about 30 cars.

Q. Did you pass through or come to the town or station of Hulls, Illinois, that day?

A. Yes, sir.

Q. Do you know about what time you reached that point?

129 A. About 5:35 p. m.

Q. Do you know whether or not there is a crossing with the Burlington road at that place?

A. Yes, sir.

Q. What, if anything, did you do before you reached the station as Hulls, within a short distance of it, relative to the operation of the train?

A. I whistled for town and shut off; stopped; accepted the crossing.

Q. At what point on the line east of Hulls did you stop? About how many feet, if you know?

A. I was about 300 feet; might have been a little closer.

Q. Is there any particular point at which you stop—anything designating that point?

A. Anywhere within 800 feet; generally figure on stopping about where I did.

Q. That is about how far east of the crossing?

A. About 300 feet, I believe.

Q. East of the crossing?

A. Between two and three hundred feet.

Q. Do you know whether or not at that time there was a stop board located east of the station there at Hulls?

130 A. Yes, sir.

Q. Where did you stop with reference to that stop board, if you know?

A. It was not very far from it.

Q. Which way from it did you stop?

A. East.

Q. And you say the rules are that you stop anywhere in about 800 feet?

A. Eight hundred feet of the crossing.

Q. That is, it shall not be further away than 800 feet?

A. Anywhere within 800 feet; not further away.

Q. About how close to the crossing are you permitted to go without stopping?

A. I don't know how close; the law says anywhere within the crossing or 800 feet thereof.

Q. About how close to this stop board were you, if you can tell us, when you stopped?

A. We was not very far.

Q. Could you just approximate it in feet?

A. I guess between 50 and 80 feet.

Q. Which direction from the board?

A. East.

Q. Did you bring your train to a full stop?

A. Yes, sir.

Q. What whistles, if any, did you give?

131 A. Two blasts of the whistle.

Q. What do they indicate?

A. That you accept the crossing; crossing clear.

Q. What do you mean by accept the crossing?

A. That the crossing is clear.

Q. How can you ascertain whether or not the crossing is clear?

A. When there is nothing on it.

Q. Is there any sign, or post, or anything of that kind, or semaphore,—anything of that kind, which tells you whether the track is clear or not?

A. No, sir.

Q. Is there a semaphore located at that place?

A. No, sir.

Q. None at Hulls?

A. Only an order board.

Q. What is the purpose of that order board?

A. The position of it at all times is a stop, and when you call for the board, if the operator has no orders for you, he clears your board—drops the arm down.

Q. And is the regular position of the board at stop?

132 A. The normal position is at stop—the arms out.

Q. Do you mean by that you are not to go on past until you receive the sign?

A. Get your board clear, or get something on the board.

Q. Do you remember on this occasion at what position the board was located?

A. It was supposed to be after hours, I think; no light or anything on it; them operators, I don't know their hours, but generally along about 5 o'clock, I think, for the Wabash; don't know about the Q.

Q. What position did the semaphore point on that occasion, if you know?

A. The board was clear both ways.

Q. You came to a full stop and sounded two blasts?

A. Yes, sir.

Q. Then what did you do?

A. Started up.

Q. At what rate of speed were you going by the time you got to the crossing of the Q?

A. Along about I should judge about eight miles an hour; six or eight miles.

Q. Did you see or hear any train on the Q track at that time?

A. No, sir.

133 Q. Did you hear any Q train whistle?

A. No, sir.

Q. Did you see the light or smoke from the Q train?

A. No, didn't see anything until I got on top of them.

Q. Which side of the cab were you on?

A. Right side.

Q. That would be on the north side of the train, would it not?

A. Yes, sir.

Q. Were you looking or did you look in the direction of the Q track to ascertain whether or not there was a train on it?

A. Yes, sir.

Q. Did you see any train?

A. No, no train.

Q. No train there?

A. I couldn't see anything at all.

Mr. Roberts: Do you mean to say there was no train there?

The Witness: I guess there was; must have been.

Q. What kind of view have you of the Q track there?

134 A. Well, going that direction it is not very good.

Q. In fact, when you stop at the stop board can you see the Q track at all from that point?

Mr. Roberts: Defendant objects to that question as leading and suggestive.

Q. Can you at the point where you stopped see the Q track?

A. You can now.

Q. I mean at the point where you say you stopped on the 30th of October, can you see the Q track from that point?

A. Yes.

Q. What space is it?

A. I suppose 25 or 30 feet.

Q. Where is that space you can see in reference to the depot?

A. It is right from the depot out to the crossing.

Q. On the other side of the depot, up north on the Q track, could you see a train on the Q track from the position in which you stopped that evening?

A. You could not that night.

Q. Was there anything unusual that night?

A. Nothing only I laid it to the weather, the Fall weather, 135 you know, hazy in spots, and other places will be clear.

Q. Is there any line from the place where you stopped that night or evening to the Q track where you can see a Q train on the track north of the depot on the Q line?

A. Yes.

Q. Where is that with reference to the depot?

A. It is right from the depot north there for a short space, there is a track back of the depot, you know.

Q. Do you know where the stop board is now on the Wabash?

A. Yes.

Mr. Roberts: Deferdant objects to any testimony as to the condition of the boards or any changes made in the location of the boards since the accident.

Q. Where is the location of the board as it now exists with reference to this space through which you say you could see back of the depot?

A. Right along where that space is.

Q. Do you know in which direction the stop board was located on the 30th of October, as compared to where it is located now?

A. East.

136 Q. About how much further east, if you know?

A. Well, it is pretty hard to get a distance like that in your mind without being there; I suppose about 100 feet; might be more than that.

Q. If you come back 100 feet east of the point where the stop board is located now I will ask you whether or not from that position you could see the Q track north of the depot?

A. No, you can't see the Q track north of the depot from there.

Q. Now it was down something like 100 feet east of where it is now when you stopped there on the 30th of October?

A. Yes.

Q. I will ask you if from the point at which you stopped on the evening of October 30th last you could see the Q track north of the depot?

A. Where I stopped that night?

Q. Yes.

A. No.

Q. You could not?

A. No.

Q. You may state why you could not.

A. Well, there is an elevator there, and buildings, and cars; cars back of the elevator; there is an elevator right along in that space.

137 Q. What was the condition of the weather—was it clear, or cloudy?

A. I don't know whether it was clear or cloudy; it was just hazy, like, if you have ever been out on the road in the Fall of the year you will run along maybe a half mile and you are in a haze and maybe the next half mile it is just as clear as crystal; that's the way it was.

Q. Was it clear, or hazy at Hulls at that time?

A. It was kind of hazy.

Q. Was it raining?

A. No—it started raining right after the wreck.

Q. I will ask you whether it was cloudy at the time of the collision?

A. Must have been; it was kind of dark.

Q. How soon was it after the wreck, if there was one, that it started to rain, if you know?

A. I don't know; couldn't say how soon, or anything about it; I had too much on my hands; it was not very long after.

Q. Was it within the space of an hour, or not?

A. I should judge along about ten minutes.

138 Q. Now, after you pulled up, after you had stopped and had given the two blasts of the whistle for clear crossing and then pulled up, state what, if anything, happened when you got to the Q crossing?

A. When I got right about the corner of the depot, I saw that Q engine.

Q. Now, when you got to that point how far were you from the crossing, about?

A. I guess the pilot of the engine was very near on the crossing.

Q. When you got in view of the Burlington engine?

A. Yes.

Q. Could you state how near the crossing the Burlington engine was when you first saw it?

A. He was about the same as I was.

Q. About how far, now, would that be—the pilot of his engine was also just about to the crossing?

A. Just about on the crossing.

Q. Do you know about the rate of speed the Q engine was running?

A. No, I don't; it seemed to me it was going pretty fast.

Q. Could you tell whether it was going faster than your engine was going?

A. No, there was not much time to figure speed, or anything else, right then.

139 Q. Was there a headlight burning on the Q engine?

A. I don't know.

Q. Was the headlight burning on your engine?

A. Yes, my headlight was lit.

Q. Just after that tell what occurred?

A. Well, it seemed to me that that little Q engine tried to climb up on our pilot, the last I seen of her was about the cab and then went off to one side, and mine turned over; both of them turned over.

Q. About what part of the Q engine did your engine come in contact with?

A. Just as I say, the two pilots come together, just like that, and the Q engine it seemed like she started to climb up like that, got back about the cab and went to one side.

Q. On which side of the track did the Q engine go?

A. She run over on the south side.

Q. The south side of the Wabash track?

A. South side of the Wabash, yes.

Q. Which side of the Q track?

A. I don't know. I think she was lying right off the dump.

140 Q. On the right or left side of the Q track as you are going south?

A. It would be on the right.

Q. On which side of the Wabash track did your engine go off?

A. On the left side, south side; we was over the Q crossing.

Q. Did you remain in the cab until it turned over?

A. Yes, sir.

Q. Who was with you, if anyone, in the cab, at the time the collision took place?

A. The fireman and brakeman.

Q. Did they both remain in the cab?

A. Yes.

Q. Until it turned over?

A. Stayed in there; I got them out, both of them.

Q. What was the fireman's name?

A. J. W. Long.

Q. And the brakeman?

A. Tom Bean.

Q. Was he the head brakeman?

A. Yes.

Q. Had he been riding in the cab with —?

A. Yes.

141 Q. What is the purpose of the head brakeman riding in the cab?

A. That is where he belongs; that is his assignment on the train crew.

Objected to by the defendant and sustained.

Q. Was there any particular place assigned for the head brakeman to ride?

A. He has a seat on the left side.

Objected to by the defendant, and sustained.

Q. But under your instructions, the rules of the company, is there any place?

Mr. Roberts: Defendant objects on the ground that the rules would be the best evidence.

Q. Where does the head brakeman usually and customarily ride on the freight trains?

A. On the left side of the cab, on his side.

Objected to by the defendant, and sustained.

Q. Is that the universal custom among freight brakemen on freight trains?

A. It is on the Wabash.

Objected to by the defendant, and sustained.

Q. Were you there when the wreck was cleared away, or when the engines were lifted up?

A. No, sir.

Q. Do you know whether or not any one was killed in that collision?

142 A. Well, the C. B. & Q. engineer was killed.

Q. Did you see him?

A. No, didn't see him at all.

Q. How long did you remain at the scene of the wreck, Mr. Long?

A. Just long enough to get them fellows out and take my brother over to the doctor's office; then I come back.

Q. Then where did you go?

A. Over to the doctor's office.

Q. How long did you remain in Hulls?

A. We was in Hulls about four hours.

Q. Did you assist in the work of clearing away the wreck, anything of that kind?

A. No.

Q. Did you assist in moving any of the cars of your train or any other cars there?

A. No, sir.

Q. Had nothing to do with that?

A. No.

Q. Do you know where the transfer track is located that extends between the Q and the Wabash lines, if there is one at that point?

A. Well, they call it the Y, there by that elevator.

143 Q. On which side of the depot is that, front or back?

A. It is to the east; along to the east side and to the back.

Q. Do you know whether or not there were any cars on that transfer track at the time the collision took place?

A. I believe there was a couple of cars on there; might have been more.

Q. Do you know the kind of cars they were, whether box cars, or flat cars, or the nature of them?

A. No, I don't.

Q. You think there were two or more cars on the transfer track?

A. Yes, the reason I don't know that, because the local engine got them out of there for number 12; I saw them taking them out of there but what kind of cars they were I don't know.

Q. Who was the engineer of the local engine, if you know?

A. I couldn't tell you that.

Q. Where did the local engine come from that night?

A. Come from Kinderhook, I believe.

Q. Do you know any of the brakeman or fireman with it, any of the crew?

144 A. No, I don't know who was on the local that night; you see there is one crew one day and another the next.

Q. Did you know the name of the two engineers that ran these crews?

A. There is one fellow named Bingham, and who the other side of that local was I don't know; they change around a good bit; there was a fellow named Watson on there, now—Bingham and Watson.

Q. Was he there at that time?

A. No, just got that run a week or so ago.

Q. Where does Bingham live, if you know?

A. Down at Bluffs.

Q. You don't know who the other man was on the run the other part of the time when he was not on duty?

A. No, I don't know who was on there that day.

Q. You have stated that you thought you were running somewhere about 6 to 8 miles an hour—is that correct—at the time the collision took place?

A. Yes, sir.

Q. How do you arrive at your rate of speed?

145 A. I don't know—just from memory, that night, at that time.

Q. State whether or not the point at which you had stopped and the length and weight of the train would have anything to do with the rate of speed at which you were again running within a given distance?

A. Not at that point it wouldn't. Of course if a man had a good big, heavy load on, big train, he couldn't get going as fast as if he just had a caboose, but I never did make it a practice of speeding around there—danger of fire to work an engine very hard getting out of there; for that reason we take it easy, all I know.

Q. Did you make any statement or issue any report after the time of this accident?

A. Yes, sir.

Q. To whom was that made?

A. I made my statement to Mr. Brown, superintendent, C. E. Brown.

Q. Superintendent of what?

A. The Springfield division of the Wabash.

Q. Where is he located?

A. Here in Springfield.

Q. I will ask you whether or not after this accident you attended a joint conference of the two roads in reference to the accident?

146 A. No—they had us there that night—had me in there, asking me a few questions, but I wouldn't call it no conference.

Q. In where?

A. In the depot that night, that is, the next night, we was down there at a coroner's inquest.

Q. Who was asking you the questions that night?

A. Mr. Worden of the Q and the rule expert, I think his name is.

Q. Was there an oral or a signed statement?

A. There was no signed statement; they had a stenographer there taking it down but I never signed no statement.

Q. These men that were present, with what road are they employed?

A. The C. B. & Q.; the Wabash, Mr. Brown and Mr. Lock was there.

Q. Mr. Brown, your superintendent, located at Springfield?

A. Yes, train master.

Q. Lock is located where?

A. Here.

Q. Who was there, if any one representing the Q at that time?

147 A. Worden, superintendent of that division.

Q. Where is he located, if you know?

A. I don't know; Quincy, I believe.

Q. Who else was present?

A. A gentleman by the name of Shultz, I believe.

Q. Do you know what he is?

A. Somebody said he was a rule expert.

Q. For what road?

A. C. B. & Q.

Q. Do you know where he lives?

A. No, I don't.

Q. Were those all that were present?

A. Yes.

Q. Was this statement you made merely oral, or in writing?

A. I say they had a stenographer there and he took it down.

Q. Was that afterwards signed by you, or not?

A. No, it was not signed.

Q. Have you seen that statement since the night you made one?

A. No, sir.

148 Q. Have you gone over the facts in the case since that time with any representative of the Q road?

A. No, this is the first I knew of it.

Q. Have you gone over the facts with any Q representative since?

A. No.

Q. Did you go over the facts with Mr. Roberts this morning before giving your deposition?

A. No.

Q. Your statements made at this time are substantially the same as made by you at that time?

A. Yes, sir.

Cross-examination.

By Mr. Roberts:

Q. That is a day station, is it not?

A. Yes, sir.

Q. They close at 5 p. m.?

A. Five o'clock I believe is the hour.

Q. You say that your best recollection is that the Burlington train was going pretty fast when it hit the crossing?

A. Yes, looked to me like it was going awful fast; he had a short train.

Q. That is your best recollection, that he was going very fast?

149 A. Yes.

Q. Pretty fast?

A. Yes, sir.

Q. What kind of headlight did you have?

A. What they call acetylene light; gas light.

Q. The board they kept there at the station, that was merely for the purpose of giving you train orders?

A. Yes, sir.

Q. That was a matter that was to be done independently by the engineers on each road on approaching the crossing?

A. Yes, sir.

Q. And it remains ordinarily in a horizontal position?

A. Yes, sir, that is the normal position for the boards on the Wabash; Q too, I think.

Q. At the time you approached this crossing it was at a normal position?

A. No, it was down; clear.

Q. That indicated that the office was closed?

A. Yes, sir.

Q. And that there was no one there?

A. No orders for us.

Q. You knew the office closed at 5 o'clock?

150 A. Yes, sir.

Q. The fact that it was down did not indicate to any engineer that the crossing was clear?

A. O, no.

Q. That was a matter for each engineer on each road to determine?

A. Yes, sir.

Redirect examination.

By Mr. Wilcox:

Q. You spoke about the Q train coming fast. You knew, did you not, that the Q train was merely pulling up far enough to get the cars up to the station to stop?

Q. No. I had no idea of the kind of work they do, or the movements they make.

Q. You have learned and know since that time that they were merely pulling up to the station to stop, do you not?

Mr. Roberts: Objected to by defendant as calling for hearsay testimony. The witness can only testify to what he knows, not to hearsay, or what he learned from others.

Q. Mr. Long, assuming that the Q train stopped a distance of 200 feet back from the crossing and had started up for the purpose of unloading passengers and freight and stopping at the station, only for the purpose of pulling up a sufficient distance to allow the cars to come up to the platform, what rate would you say that the engine would be going at that time and place?

A. Well, I don't know——

A. I don't know—it was Savage, I believe.

Q. So in making up your estimate of the speed at which the Q train was going you are basing it on the assumption that he was not going to stop at the platform—is that correct?

A. Yes.

Q. If it were a fact that he was to stop at the platform stop with his cars at the platform, would that make any difference in your idea as to the rate of speed he was going at—if you knew those were the facts, instead of assuming that he was not going to stop?

A. Yes; the way he looked to me to be going he never would stop at the platform.

Q. You don't think it would be possible for him to stop at the platform at the rate of speed at which he was going?

A. It is possible it might have been; trucks on trains are different, you know.

Q. Is it on the assumption that he was not intending to stop you base your ideas of the speed at which he was going?

152 A. Yes, sir.

Q. Did you say that it didn't look like he was going to stop, or he didn't look like he was going to stop?

A. Didn't look like he intended to stop.

Q. What didn't?

A. The train.

Q. You didn't see the engineer at all, did you?

A. No.

Q. He was on the opposite side of the cab from you?

A. Opposite side from me.

Q. He was not in view——

A. As I say, too, it was kind of dusky, you know,—not broad daylight; just that time in the evening when it is hard to see; between day and night.

Q. And the first time you saw his engine was when you say, the pilot was practically on the crossing?

A. Yes.

Q. And from the time the pilot of his engine was on the crossing until it had gone far enough for the engines to come together is the only time you had to judge of the speed at which he was going?

153 A. Yes, sir.

Q. That was a distance of about how many feet, would you say?

A. From the time he popped into view and everything, I judge about 30 feet.

Q. You stated that the station was already closed, did you not—that you thought it was?

A. Yes.

Q. I will ask you whether or not you did not see the station agent and the operator both there at the time of the collision or immediately afterwards?

A. No.

Mr. Roberts: Defendant objects to that as immaterial, whether they were there after the station was closed, under the rules.

The Witness: On our road we can call the operator, man who has charge of the keys, telegraph station, call him whenever we want him.

Q. On this particular occasion didn't you see the agent and operator both there?

A. Well, afterwards.

Q. How long afterwards?

A. I don't know how long after it was; don't know when I first got to the telegraph office afterward.

154 Q. Didn't you know that there was freight and other material out on the platform when you reached there that evening?

A. Sure, they leave that out all night lots of times.

Q. Do you know what time the station closes?

A. About the time we got along there that night; about 5 o'clock.

Q. How do you know it closes at that time?

A. Well, you come along there in the evening about that time, no lights on the samaphore, no lights around the depot, supposed to be closed, I guess.

Q. Don't you know it to be a fact, as well as a rule of the company that the agent works until eight o'clock every night at that place?

A. They are Q men; I don't know about the Q men.

Q. You know those men are in the joint employ of both roads, do you not?

A. No, I never knew that.

Q. You know that there is only one station agent and one operator there?

A. Yes.

155 Q. You know that the Wabash does not maintain a separate agent and a separate operator?

A. I don't know whether they do or not; there is two men there.

Q. Do you know their positions—know what they are?

A. No, I don't; they both take orders; don't know which is the operator or which the agent.

Q. You know that both of them take orders?

A. Yes.

Q. Both of them were still there that evening after the wreck?

A. Yes, sir, quite a while after.

Q. Those are the only two men employed at that station?

A. I couldn't tell you that.

Q. Have you ever seen any other men working there except those two men?

A. Never paid much attention to it; very seldom we ever get an order there; through freight men don't have very much business around them stations anyhow.

Q. Do you run on any regular run on that line?

A. No, sir.

156 Q. Have you had occasion to pass there frequently between five and eight o'clock in the evening with trains?

A. Not frequently; sometimes get long there about that time; other times won't be along there for a month or two months.

Q. Have you not repeatedly, when you went through there between five and eight o'clock in the evening, seen that the station was still open?

A. Well, around that passenger train's time.

Q. What time is that?

A. Well, 15 is due there about 8 o'clock.

Q. And the station is open at that time?

A. Yes, sir.

Recross-examination.

By Mr. Roberts:

Q. The employees at the depot, however, have nothing whatever to do in getting you to cross over the crossing?

A. No, sir.

Q. And the purpose of the board is simply to give you train orders.

A. Just a train order board is all it is?

Q. Train order board?

157 A. Yes.

Q. No interlocking plant there?

A. No, sir.

Q. If they have an order for you they simply, when you get within view of the depot, they change the board from horizontal, down?

A. If they haven't any.

Q. If they haven't any?

A. Yes.

Q. And that is the only purpose of that board?

A. Yes.

Q. That is also true when they are on duty?

A. When they are on duty. When they are off duty the board both ways are down, one for east and one for the west.

Q. Remain that way?

A. Yes, sir.

Q. When they are off duty?

A. Yes, sir.

Q. And I presume your time card will show when that office closes.

A. The Wabash don't. The only thing that tells you on your time card whether you got a day and night office is D and N, you know; that is day and night offices.

M. A. LONG.

158 Subscribed and sworn to before me this 15th day of February, 1917.

[SEAL.]

SIDNEY S. BREESE,
Notary Public.

Thereupon the court adjourned until 9:30 o'clock Wednesday morning.

Wednesday, February 19, 1919, 38th day of the term, all parties counsel and jury being present, the following further proceedings were had and entered of record, to-wit:

BOLAND MCGEE, being produced, sworn and examined as a witness on the part of the plaintiff, testified as follows:

Direct examination.

By Mr. Parkinson:

Q. Mr. McGee, what is your full name?

A. Bolant McGee.

Q. How do you spell that please?

A. M-c-G-e-e.

Q. Where do you live?

A. Quincy, Illinois.

Q. Where did you formerly live?

159 A. Hulls, Illinois.

Q. Where were you living during the month of October, 1916?

A. Hulls, Illinois.

Q. And where did you live during the months of April and May, 1917?

A. Hulls, Illinois.

Q. How long prior to October, 1916, had you lived in Hulls, Illinois, about?

A. About thirteen years.

Q. I will ask you to look at this map, Mr. McGee, the correct map that is offered by plaintiff—

Mr. Roberts: I would like to have it designated as some exhibit.

Q. The one drawn by Mr. Wade marked Plaintiff's Exhibit L by the stenographer. You are now designating the map referred to by the witness Wade, as Exhibit L, that is correct, is it not, Miss Stenographer?

Stenographer: Yes, sir.

Q. In this map which is marked Plaintiff's Exhibit L, it is drawn to represent the line of railway marked C. B. & Q. R. R. Co. is drawn to represent the Chicago, Burlington & Quincy Railroad Company's tracks running in a southeasterly and northwesterly direction.

160 Mr. Roberts: Defendant objects to any reference to this map because it is not offered in evidence.

Mr. Parkinson: It was very much in evidence.

The Court: Put the mark on it and consider it in evidence.

Mr. Roberts: It has never been offered in evidence because it shows things that have been argued before the court that were not there at the time of the accident.

The Court: Any showing on the map as to the present stop post, will not be admitted in evidence. With that change the court permits it in evidence. Proceed, Mr. Parkinson.

Q. This is drawn to represent the ~~X~~ connecting the Wabash track with the Burlington, and it represents the Wabash track running east and west; this represents the depot and this represents some store buildings, and up here (indicating another map furnished by defendant) this is directly north with the points of the compass. I do that so that you will not be confused in having the store buildings turned around and not looking in the same direction—

Mr. Roberts: I object to that remark as improper before this jury.

161 Mr. Parkinson: I don't know why. That is my purpose.

Mr. Roberts: I suggest it be referred to as the map which is marked Plaintiff's Exhibit L and the other as Exhibit I.

Q. You will notice these two maps. I have turned those maps so both will look north. That is my purpose, because I am going to ask you some questions about it. Now, this represents a depot. You saw this map and examined it at the last trial, did you not?

A. Yes, sir.

Q. Were you familiar with the conditions up there in October, on the 30th of October in 1916?

Q. With the exception of this stop post here which is not to be considered by you?

Mr. Roberts: I object to that as being improper.

Q. I would like to finish my question without interruption.

The Court: Go ahead and ask your question.

Q. Does this map show—I am referring to Plaintiff's Exhibit L—correct conditions that existed there with reference to these tracks, buildings, etc., such as are or were there at that time?

162 A. Yes, sir.

Q. I notice on this map, Mr. McGee, some blue and red marks, marked P No. 1 and P No. 2, on the Burlington track south and west of the crossing, and P No. 1 and P No. 2 in blue and red each on the Wabash crossing—I ask you whether or not you took or were present at the taking of some of the pictures?

A. Yes, sir.

Q. Do you remember when those pictures were taken?

A. In May.

Q. What year?

A. 1917.

Q. 1917. Now, if you will look at Plaintiff's Exhibit J, the picture marked number one. Tell the court and jury with the exception of the stop post in the picture, whether or not that picture accurately shows the conditions as they existed at Hulls in October, 1916.

A. All except the stop post.

Q. Did you take the measurements of the man shown in that picture, or are you one of the men in that picture?

A. No, sir.

Q. Did you assist in taking the measurements, showing
163 where these men were in this picture, the one just by the corner of the depot and the one over by the corner of the elevator?

A. Yes, sir.

Q. You did?

A. Yes, sir.

Q. That is picture No. 1. How far from the crossing along the Burlington track, was the camera sitting at the point where that picture was taken, picture No. 1.

A. It is marked on the map; I can't see it from here.

Q. Will you come down and examine it? Is it correctly marked?
Dir you examine it and know at the time?

(Witness examines the picture.)

A. 240 feet.

Q. 240 feet?

A. Yes, sir.

Q. Now, where is the man—This man standing here at the corner of the depot—how far is it east along the Wabash track from the crossing?

A. 115 feet.

Q. 115 feet?

A. Yes, sir.

Q. How far is the man, apparently standing at the corner of the elevator there, how far is he east from the crossing along
164 the Wabash track?

Mr. Roberts: Could you tell without referring to that map how far he was?

A. No, sir.

Mr. Roberts: Well, I submit that this witness cannot testify to what he sees on that map before this jury.

The Court: He may refresh his memory from any data made at the time he was there.

Examination.

By Mr. Roberts:

Q. Did you make these notations on that map?

A. No, sir.

Q. Did you have the map down there when the figures were made?

A. Yes, sir.

Q. Was the map made at that time?

A. The lines were made.

Q. I am talking about the map before you?

A. Yes, sir.

Q. The general outlines were made?

A. Yes, sir.

Q. When were the pictures taken with reference to the time the measurements were made for the map?

The Court:

165 Q. When were the pictures taken with reference to the time the measurements were made for the map? What month were they made in?

A. I forget.

Q. Were the pictures taken at the same time these measurements were made or afterwards?

A. Afterwards.

Q. Do you know that the map was there and the conditions put right at that time and on and were they correctly put on?

A. Yes, sir.

Examination.

By Mr. Parkinson:

Q. Now then, what is the distance from the Wabash crossing in picture No. 1 that I asked you about, where the man is apparently standing over here at the corner of the elevator?

Mr. Roberts: I submit that it is in evidence that this witness did not make this map, and I submit he cannot testify to this chart that somebody else put on the map.

The Court: He was present when it was made and when the notations were put on the map helping make the measurements. Proceed.

To which ruling of the court defendant at the time excepted and still excepts.

166 Q. What is it the sum of?

A. 115 feet and 122 feet.

Q. I hand-you Plaintiff's Exhibit K, a picture, and you were asked to show where the camera was north and west of the Burlington track from the crossing—What was the distance the camera was set for that picture?

A. From the crossing?

Q. From the crossing, yes?

A. 276 feet.

Q. Now, there is a man shown in that picture also at the corner of that building behind the elevator. Now, the man at the corner of the depot, apparently, in that picture, how far was he located in the picture west of the crossing?

A. You mean east of the crossing?

Q. Yes, east of the crossing along the Wabash track?

A. 109 feet.

Q. How far was the man over by the elevator corner located?

A. The sum of 109 feet and 88 feet.

Q. Who was present and had the map in Hulls at the time these measurements were put on?

A. Mr. Wade.

167 Q. Mr. Wade. Do you remember the evening that Mr. Frese was killed?

A. Yes, sir.

Q. At Hulls, the engineer on the Burlington train?

A. Yes, sir.

Q. In a collision?

A. Yes, sir.

Q. Do you remember the train he was engineer on—Did you see the train before he was injured?

A. Yes, sir.

Q. In what direction did that train come from?

A. Northwest.

Q. From the northwest?

A. Yes sir.

Q. Where had you been prior to that and where were you going at the time of this wreck?

A. I had been at the stock yards and was going toward the depot.

Q. Where with reference—By the way, are those pictures—Tell the jury whether or not they correctly and accurately show—those pictures No. 2, the picture No. 2 shows correctly and accurately the

location of the section house on the west side of the track and
168 the bunk house on the west side and south side of the Burlington track, the southwest side of the Burlington track?

A. Yes, sir.

Q. They do show those things?

A. Yes, sir.

Q. Was there at that time a stop post located on the west and

south side of the Burlington track? Was there a stop post located there at that time along the track?

A. Yes, sir.

Q. Where with reference to the section house was that?

A. At the northeast corner of the section house.

Q. At the northeast corner of the section house?

A. Yes, sir.

Q. Where—By the way, what kind of a train was it that Mr. Frese was on?

A. It was a mixed train.

Q. What do you mean by a mixed train?

A. Coaches and box cars.

Q. How many box cars were there?

A. Six or eight.

Q. How many coaches?

A. Two.

169 Q. As that train approached that crossing that night, state whether or not it stopped?

A. Yes, sir.

Q. Whereabouts did it stop with reference to the stop post as it then existed?

A. Somewheres near the wagon crossing.

Q. How far was the pilot of the engine from the stop post as it then was?

A. Twelve or fifteen feet.

Q. And which way?

A. Northwest.

Q. Northwest. In other words, is there a crossing north of this store building shown in map marked Plaintiff's Exhibit L that runs just about where it would run into the bunk house shown in the picture, running just up to the bunk house?

A. Yes, sir; a wagon crossing.

Q. A wagon crossing in the street, you mean?

A. Yes, sir.

Q. When the train stopped, did the engineer give any signal?

A. Yes.

Q. How?

A. Whistled.

Q. How many times?

A. Twice.

170 Q. Did you hear any other whistle on any other train at that time?

A. No, sir.

Q. On the Wabash track?

A. No, sir.

Q. Which direction were you at the time this train stopped. Where were you from the stop post as it then existed?

A. I was pretty near the street crossing from the stop post.

Q. You mean on which side of the track?

A. The north side.

Q. Yes. Now, did you know the fireman on that engine?

A. Yes, sir.

Q. Who was he?

A. Mr. Savage.

Q. Mr. Savage. As that train pulled up to the depot, did you see at what rate of speed it was going?

A. About six or seven miles an hour.

Q. About six or seven miles an hour. Whenever there are passengers to unload at the platform, where does the engine have to go with reference to the Wabash crossing?

A. It would have to cross the crossing.

171 Q. How far?

A. I couldn't say.

Q. Did you notice the fireman on the Burlington engine when he passed you?

A. Yes, sir.

Q. What was he doing?

A. It seemed like he was looking straight ahead.

Q. What was the position of his head with reference to sitting or leaning?

A. Well he was leaning in the cab something like this (indicating).

Q. What was he looking through as he looked forward?

A. It looked to me like he was looking through the front window.

Q. Was he looking outside of the cab, or looking through the front window in front of the cab?

A. It looked to me like he was looking through the front window.

Q. Did you continue to watch him as he approached the crossing?

A. Yes, sir.

Q. How close had his engine gotten to the Wabash crossing track when he continued in that position?

172 A. I judge 30 to 35 feet.

Q. From what?

A. The depot.

Q. From what part of the depot?

A. The southwest corner.

Q. That would be this corner (indicating)?

A. Yes, sir.

Q. How far was he from the crossing itself, in feet?

A. Oh, I judge about 50 or 60 feet, something like that.

Q. Did you see what he then did?

A. No, sir.

Mr. Parkinson: Take the witness.

Cross-examination.

By Mr. Roberts:

Q. How long had he lived in Hulls?

A. About 13 years or 15.

Mr. Parkinson: May I interrupt you a moment, Mr. Roberts? I neglected to ask one question. Who was present with you as you were walking down there?

A. Mr. Shepherd.

Q. Mr. Shepherd?

A. Yes, sir.

173 Mr. Roberts: Now, this depot has been in the same place for years, has it not?

A. Yes, sir.

Q. And the coal shed has been in there for many years?

A. Yes, sir.

Q. And the store buildings close to the transfer track have been there for many years?

A. Yes, sir.

Q. And the elevator has been there for many years?

A. Yes, sir.

Q. And the bunk house. What do you call this house? What is your name for that, this little house here?

A. That is the section house.

Q. And what do you call this little building here?

A. That is a kind of a bunk house, I guess.

Q. Some of them refer to it as the tool house?

A. That is an old box car that sets there.

Q. That is the old bunk house?

A. Yes, sir.

Q. That is what some of them refer to as the tool house?

174 A. I couldn't say. There is an old box car setting there.

Q. Now, you think that the stop post was at the northeast corner of the section house?

A. The southeast.

Q. Oh, down on this side of it?

A. Yes, sir.

Q. As a matter of fact, wasn't it here at the southeast corner of the bunk house, right here, Mr. McGee, right at the corner I have indicated?

A. I think not.

Q. I want you to refresh your memory and I will ask you if you do not remember that the stop post was right here at the southeast corner of the bunk house?

A. I think not.

Q. Now, there are some boards across the ties right in front of the section house, are there not?

A. Yes, sir.

Q. In the track?

A. Yes, sir.

Q. And those boards are opposite the section house?

A. Yes, sir.

Q. Now, as a matter of fact, to refresh your memory, is not the post right in there, a few feet north of where you say it was?

175 A. I think not.

Q. Now, the conditions there such as I have called your attention to upon the Wabash and the Burlington tracks, and the buildings, were there and had been there in the same condition for many years prior to October 30, 1916, hadn't they?

A. Yes, sir.

Q. And the track was in the same condition. That is a fact is it not?

A. Yes, sir.

Q. The stop post has been where you say it was, and had been at the same place for many many years, had it not?

A. I think so.

Q. Now, do you see anything wrong with this map here marked Plaintiff's Exhibit I?

A. No, sir.

Q. That is a fairly accurate map of the buildings and grounds and obstructions etc., as they were on that day, is it not?

A. As far as I can see, it is.

Q. Now, in Plaintiff's Exhibit No. 2, in picture No. 2, in Plaintiff's Exhibit K that I was trying to call your attention to, Mr.
176 McGee, there are some boards of the crossing, that is right in front of the section house, is it not?

A. Yes, sir.

Q. Right close to the section house is the bunk house?

A. Yes, sir.

Q. To refresh your memory I will ask you if the stop post was not right in there at the corner of this bunk house?

A. I think not.

Q. You're certain about it?

A. I think it is right in here.

Q. You mean on this side of the section house?

A. No, sir; on the other side at that time.

Q. That is what I am talking about, on that day. You think it is a few feet south of that?

A. Yes, sir.

Q. Now, there is a street over here that is not shown on Plaintiff's Exhibit L?

A. Yes, sir.

Q. That is not shown on the map marked Plaintiff's Exhibit L?

A. No, sir.

Q. That is shown on Plaintiff's Exhibit I, is it not?

A. Yes, sir.

177 Q. It shows the walk along that street, does it not?

A. Yes, sir.

Q. And the frog where the transfer track leaves the C. B. & Q. track is right at the north end of that street, is it not?

A. Yes, sir.

Q. That street is forty feet wide, isn't it?

A. I don't know.

Q. Well, it is about that?

A. I judge something like that.

Q. It runs north of the bunk house, doesn't it, this way?

A. Yes, sir.

Q. Now, you say the engine at the time, on this evening in question, on October 30, 1916, stopped right on this street crossing? That is a fact is it not?

A. Somewhere near the crossing.

Q. Refresh your recollection about that. That is what you call a street and a wagon crossing here, is it not?

A. Yes, sir.

Q. Your memory was better when you testified in 1917 wasn't it? It was more recent?

A. I don't know.

Q. How long has it been since you testified before in this case? It has been very nearly two years, has it not?

A. I think about that time.

Q. Now, I will ask you, Mr. McGee, for the purpose of refreshing your memory about the facts, if you did not testify in that case that this engine stopped exactly on this wagon crossing?

Mr. Parkinson: We object to that; the evidence is the best.

The Court: Objection overruled.

A. Somewhere near the crossing.

Q. That question I asked you, did you testify to that?

A. I don't remember.

Q. Let me refresh your memory. I will ask you if this question was asked you, and if you made the following answer: "Q. Where did the engine stop with reference to the stop post as it existed at that time? A. It stopped at the crossing, wagon crossing." Now, was that question asked you and did you make that answer at the last trial of this case?

A. I guess I did.

Q. And you told the truth when you made that answer, did you?

A. I tried to.

Q. Now, then do you know how far it is, or did you measure, Mr. McGee, to ascertain how far it is from that section house to that wagon crossing? Did you ever measure it?

A. No, sir.

Q. Do you know the length of the bunk house car?

A. 36 feet, I suppose. I never measured it.

Q. Now, you were standing when the train passed you right at this bend between the C. B. & Q. track and the transfer track, were you not?

A. Yes, sir.

Q. You were right on the ground?

A. Yes, sir.

Q. You stopped there a little bit?

A. Yes sir.

Q. And the engine passed you while you were stopping there?

A. Yes sir.

Q. It passed on in front of you?

A. Yes, sir.

Q. To the southeast?

A. Yes, sir.

Q. And after it passed you the fireman had his back to you?

A. Yes, sir.

Q. That is a fact?

A. Yes, sir.

180 Q. And he continued to have his back to you all the way to the depot?

A. Yes, sir.

Q. And when you saw him he was looking to the Southeast?

A. Yes, sir.

Q. You were standing right close to the road crossing?

A. Down this way from the road crossing?

Q. Down there and right at the bunk house?

A. Somewheres in there.

Q. Near the bunk house, and you were standing there when the train passed you?

A. Yes, sir.

Q. It is 209 feet, isn't it, from the crossing down here to about the south end of the bunk house, isn't it?

A. I don't know.

Q. We will get at it another way. Isn't it 249 feet from the crossing to the south end of this street?

A. Something like that.

Q. Something like that, and you were standing close *that* that street?

A. Yes, sir,; down this way.

Q. A few feet?

A. Yes, sir.

181 Mr. Roberts: That is all.

Redirect examination.

By Mr. Parkinson:

Q. If the chart lying there were extended out, where were you standing with reference to the stop post, as it then existed, were you standing toward the depot or back?

A. Pretty near the street crossing, I think.

Q. Pretty near the street crossing from the stop post?

A. Yes.

Q. How far did you see back of the stop post here from the stop post or pilot of the engine?

A. Probably 10 or 15 feet. Something like that.

Q. This picture—this map doesn't show the south. This walk is on the north side of the street, is it not?

A. Yes, sir.

Q. This map doesn't show the south side of the street?

A. No, sir.

Q. The map doesn't show that at all?

A. No, sir.

182 Q. The map referred to as Plaintiff's Exhibit I, if the street was extended along the north line of the street, it would run through the bunk house?

A. Yes, sir.

Q. I am talking now about Plaintiff's Exhibit I. That is all.

Recross-examination.

By Mr. Roberts:

Q. Assuming this is the pilot of the engine here. How far back of that would the fireman be in his seat? How many feet?

A. I couldn't say.

Q. To refresh your memory, would it be——

Mr. Parkinson: He asks him to refresh his memory. He has nothing to refresh it on.

Q. He saw the engine that night?

A. I don't know.

Q. Would it be twenty-five or thirty feet?

A. I think that would be about it; a guess.

Q. And he was how many feet above the ground in his seat—ten or eleven feet?

A. Yes, sir.

Mr. Roberts: That is all.

Mr. Parkinson: That is all.

Witness excused.

183 ROBERT D. CALDWELL, being produced, sworn and examined as a witness on the part of the plaintiff, testified as follows:

Direct examination.

By Mr. Parkinson:

Q. Will you state your full name to the jury please?

A. Robert D. Caldwell.

Q. Mr. Caldwell, where do you live, please?

A. Hannibal, Missouri.

Q. How?

A. Hannibal, Missouri.

Q. Hannibal, Missouri?

A. Yes, sir.

Q. How old are you, Mr. Caldwell?

A. I will be forty-one the 22nd of this month.

Q. What has been your occupation?

A. Railroading for the last 16 years.

Q. And in whose employ have you been for the last sixteen years?

A. Chicago & Alton.

Q. In what capacity?

A. Five years as fireman and eleven years as engineer.

184 Q. During that period of time did that service as an engineer represent the last eleven years?

A. Yes, sir.

Q. When did you resign from your position?

A. The 22nd day of this last November.

Q. Has your experience as an engineer been until last November a period of eleven years prior to that time?

A. Yes, sir.

Q. In what states did you run as an engineer?

A. Missouri, Illinois, and Iowa.

Q. Missouri, Illinois and Iowa. In what states were you running as a locomotive engineer for the Alton Railroad in 1916?

A. We ran in those three states; part of the time in one and part of the time in the other.

Q. During the year 1916 where would your run be in Illinois?

A. Going into East St. Louis on the Illinois side.

Q. And did you make that run during the month of October of that year?

A. Yes, sir.

Q. Now, do you know the custom and practice and method by which engineers ascertain whether the crossing is clear during the period of the sixteen years you worked there?

Do you know the custom and practice of the engineers of the railroad companies at grade crossing where no semaphore was installed to ascertain that the crossing was clear?

A. Yes, sir.

Q. State to the jury the manner and method and custom by which engineers ascertained whether or not the railroad crossing was clear?

Mr. Roberts: Defendant objects to that for the reason that there is no such custom plead in the petition of the plaintiff, and for the further reason that no custom can change the law laid down by the state of Illinois for engineers.

The Court: Objection overruled.

To which action of the court defendant at the time excepted and still excepts.

Q. State to the jury the manner and method and custom by which engineers ascertained whether or not the railroad crossing was clear?

The Court: State the customary and ordinary method.

Mr. Roberts: Defendant objects for the reason heretofore given.

The Court: Objection overruled.

186 To which action of the court defendant at the time excepted and still excepts.

A. They stop 800 feet of the crossing and bring the train to a stop, and whistle, two long whistles, and then look and if their

side is clear and they get no response from the fireman, whistle off and proceed over the crossing.

Q. By what method do you ascertain that the track of the other railroad on the fireman's side is free from danger? By what method do you ascertain that?

Mr. Roberts: Defendant objects to that because no such custom is pleaded in plaintiff's petition and for the reason that this witness knows nothing about the crossing in question.

The Court: Objection overruled.

To which action of the court defendant at the time excepted and still excepts.

A. By waiting and if there is no response from the fireman that there is any one coming on his side, it is the custom to proceed over the crossing.

Q. Tell the jury whether or not a locomotive engineer from his position in the engine is liable to see over the front part of the engine, or over the part in the cab on the fireman's side of the engine?

187 A. No, sir.

Mr. Roberts: Defendant objects to that for the reason that that is a conclusion of the witness and for the reason that he does not know anything about this engine.

The Court: Objection sustained.

Q. Are you familiar with the class of engine known as H-1 engine?

A. Yes, sir.

Q. Do you know what number 1054 engine of the Chicago, Burlington and Quincy Railroad Company would be?

A. It is in the class H-1 engine.

Q. Tell the jury whether or not a locomotive engineer from his position in the engine can see over all the paraphernalia in his side of the cab and over on the fireman's side of the engine?

Mr. Roberts: Defendant objects to that for the reasons heretofore given.

The Court: Objection overruled.

To which action of the court defendant at the time excepted and still excepts.

A. No, sir.

Mr. Parkinson: Take the witness.

188 Cross-examination.

By Mr. Roberts:

Q. You didn't have a run over this part of the line through Hull?

A. No, sir.

Q. You run trains from East St. Louis?

A. Yes, sir.

Q. Over the Alton to East St. Louis?

A. Yes, sir.

Q. You ran trains over the B. & O. then? didn't you?

A. No, sir.

Q. Has the Burlington a track from East St. Louis?

A. No, sir.

Q. What is the railroad?

A. Chicago & Alton.

Q. What running you did in Illinois was over the Chicago Alton and not over the Burlington?

A. Yes, sir.

Q. And it was only occasionally that you ran over the Chicago & Alton?

A. We ran over it all the time.

Q. You never did run over the Burlington in the state of Illinois?

A. Yes, sir.

189 Q. Whereabouts?

A. Beardstown.

Q. How many years ago?

A. 1911.

Q. You work on the Hannibal Division, don't you?

A. Yes, sir.

Q. You know nothing about this crossing here?

A. No, sir.

Q. It is the duty of the engineer, as you say, to stop anywhere within 800 feet of the crossing, that is a fact?

A. Yes, sir.

Q. If he stops anywhere within 800 feet he complies with the law in that regard?

A. Yes, sir.

Q. Do you know what the law of Illinois is as to the duty of an engineer?

A. In what respect?

Q. As to his duty at a crossing?

A. Only the rules we work by.

Q. There is a difference between a rule and a law. I am asking you if you know the law? of Illinois as to the duty of an engineer at a crossing?

A. It provides for him to stop within 800 feet of the crossing.

190 Q. I am not asking you what it is. I am asking you if you know the law?

A. I never saw it printed.

Q. That is what I say?

A. No, sir.

Q. The engineer is the man in control of the engine?

A. Yes, sir.

Q. And the fireman works under him?

A. Yes, sir.

Q. And is subject to his orders?

A. Yes, sir.

Q. Now, the engineer is required under the rules to handle his train when approaching a railroad crossing at grade with caution, isn't he?

A. Yes sir.

Q. And moving the train with caution or under control means that the speed of the engine must be such that the engine will be able to be stopped within his range of vision?

A. Yes, sir.

Q. That is a fact, isn't it?

A. Yes, sir.

Q. Now, the rules also provide, don't they, that when fogs or storms or other weather conditions, obstruct the view of the track, that the engineer must reduce the speed of his trains to permit observance of signals and any other safety device, regardless of time, does it not?

A. Yes sir.

Q. The engineer must do that?

A. Yes, sir.

Q. Now the engineer is responsible for the proper care and safe management of the engine, isn't he, under the rules?

A. Yes, sir.

Q. And that rule was in effect at that time?

A. Yes, sir.

Q. That is a fact, isn't it?

A. Yes, sir.

Q. And he is responsible under the rules in effect at that time on the Burlington for the exact observances of all signals and other precautions, isn't he?

A. Yes, sir.

Q. That is a fact, isn't it?

A. Yes, sir.

Q. Now, were you familiar with the—I believe you said you never on this part of the line?

A. No, sir.

Q. Were you ever on engine No. 1054?

A. Not that I ever remember of, no, sir.

Q. Now, let me hand you a photograph marked Defendant's Exhibit No. 1 and I call your attention to the cab of that kind of an engine. That engine which I have just showed you the photograph of has windows on the east side?

A. Yes, sir.

Q. Has it windows on the left hand side and right hand side of the cab?

A. Yes, sir.

Q. And it has windows in the front, hasn't it?

A. Yes, sir.

Q. And the man's head, if he were sitting in the engineer's side of the cab, would be above boiler on the outside of the cab, wouldn't it?

A. It would be above the boiler, just above?

Q. And the man's head would be above the boiler on the outside of the cab, wouldn't it?

A. Yes, sir.

Q. I will ask you, Mr. Caldwell, if it is not a fact that there are places on the engine that an engineer can see of the fireman's side?

A. Yes, sir; he can see straight across the boiler out the window.

Q. I am asking about the other side. Aren't there places where he can see across that boiler on the other side?

193 A. Where do you mean by in front?

Q. No, not only in front, but can't he see through here (indicating) and over this place inside?

A. Through the front window straight ahead.

Q. And he can see through here, can't he? (Indicating.)

A. No, sir.

Q. His head would be above this? (Indicating.)

A. His head would be here but he can't see over the other side of the boiler.

Q. His arm would be here? (Indicating.)

A. Yes, sir.

Q. His head about here? (Indicating.)

A. Yes, sir.

Q. The gangway would be right back of there? (Indicating.)

A. Yes, sir.

Q. He can step out on the gangway?

A. On the left hand side, you mean?

Q. Yes?

A. Oh, yes.

Q. It is only three or four feet?

A. It is just the width of the pilot.

194 Q. How far can you see the rays of a headlight in front of the engine?

A. Well, that depends upon the time of day and the condition of the headlight.

Q. Acetylene headlights you can, as a matter of fact, see the rays about 100 feet ahead of the engine?

A. Acetylene and electric.

Q. Electric lights you can see 1,500 feet, if the track is straight, can't you?

A. Something like that.

Q. And you can see the rays of an acetylene headlight a hundred feet?

A. I judge something like that.

Q. The purpose of a stop post is to require an engineer to stop his engine before going over that crossing?

A. Yes, sir.

Q. A man can see just as well, whether the train is stationary as when it is moving six or seven miles an hour, can't he?

A. Yes, sir.

Q. And the question of stopping or not stopping has nothing to do with seeing?

A. No, sir.

Q. One is distinct and separate from the other, that is a fact, isn't it?

195 A. Yes, sir.

Q. How, did you know Joseph J. Frese?

A. No, sir.

Q. Do you know how long he had been running over this track?

A. No, sir.

Q. What are you doing now, Mr. Caldwell?

A. I am not doing anything at the present time?

Q. Are Mytton & Parkinson helping you in your claim against the Wabash?

A. Yes, sir.

Q. And are you soliciting cases for them?

A. No, sir.

Q. Well, did you see old man Anderson in regard to this case?

Mr. Parkinson: We object to that.

Q. To refresh your memory—

Mr. Parkinson: What is the purpose?

A. Only if he is acting as a solicitor?

Mr. Parkinson: Well, ask him.

Q. Do you solicit cases for them, did you solicit one last Saturday?

A. No, sir.

Q. Did you see Mr. Anderson at Hannibal last Saturday?

A. Yes, sir.

196 Q. Have you solicited any cases for them?

A. No, sir.

Q. Have you filed suit against the Wabash?

A. No, sir.

Mr. Parkinson: We object to that as improper except in so far as it shows the interest of the witness against the Wabash, who are also making a defense in this suit.

The Court: Yes, sir.

Q. They are simply helping you in your suit, I understand?

A. Yes, sir.

Mr. Roberts: I believe that is all.

Redirect examination.

By Mr. Parkinson:

Q. Did I ask you about the duty of a fireman in approaching a crossing? You know that?

Mr. Roberts: Defendant objects to the question on the ground that it is a conclusion of law.

The Court: What is customary for a fireman to do under the circumstances?

Defendant excepted to the ruling of the court, and still excepts.

Q. What is customary for a fireman to do in approaching a railroad crossing?

197 Defendant objects to the question for the same reason.

The Court: Objection overruled.

Defendant excepted to the ruling of the court, and still excepts.

A. To see that the crossing is clear from trains coming to the crossing from his side.

Q. State whether or not it is customary for the fireman to be putting in fire or doing any other work as he approaches the crossing?

Mr. Roberts: Defendant objects to the question as leading and suggestive.

The Court: That is leading, Mr. Parkinson.

Q. State whether or not it is customary or the practice of a fireman as he approaches a crossing to be engaged in any work such as putting in fire?

A. No, sir.

The Court: That is all right.

Q. What is the custom of the fireman if he ascertains danger from an approaching train? To whom does he report?

A. To the engineer.

Q. State whether or not it is the duty of the engineer to leave his place at the throttle and go down on the fireman's side of the cab?

198 Mr. Roberts: Defendant objects to that question for the reason that the law governs the duty of the engineer, and because no such thing is pleaded in this case.

The Court: Objection overruled.

Defendant excepted to the ruling of the court, and still excepts.

A. No, sir.

Q. What do you mean?

A. I mean he doesn't go down and cross over on the left side.

Mr. Parkinson: That is all.

Recross-examination.

By Mr. Roberts:

Q. You know nothing about the custom at this crossing?

A. No, sir.

Re-redirect examination.

By Mr. Parkinson:

Q. You mean a grade crossing not controlled by a semaphore?

A. Yes, sir.

199 Re-recross-examination.

By Mr. Roberts:

Q. Do you know of a grade crossing at Saint Louis like this one?

A. I know of grade crossing. I don't know whether it is the same as this.

Q. On the Burlington?

A. No, on the C. & A.

Re-redirect examination.

By Mr. Parkinson:

Q. They do have grade crossings?

A. Yes, sir.

Mr. Parkinson: That is all.

Mr. Roberts: That is all.

The Court: Call your next witness.

Witness excused.

BOLAND MCGEE, recalled, further testified as follows:

Direct examination.

By Mr. Parkinson:

Q. Mr. McGee, I neglected to ask you one question when you were on the stand. Was it light or dark at the time this train pulled by there?

A. Light.

200 Mr. Parkinson: That is all.

Mr. Roberts: That is all.

ROBERT D. CALDWELL, recalled, further testified as follows:

Direct examination.

By Mr. Parkinson:

Q. Mr. Caldwell, I neglected to ask you one question when you were on the stand. You answered a question as to whether or not an electric headlight would show. Did you mean in the light or dark?

A. In the dark.

Q. And the same is true of acetylene?

Mr. Roberts: I object to counsel suggesting to the witness what answer he wishes.

The Court: Objection overruled.

To which ruling of the court defendant at the time excepted, and still excepts.

Q. State whether or not in daylight either an electric headlight or an acetylene headlight will project a light 100 feet?

A. Not in daylight.

Mr. Parkinson: That is all.

201 Cross-examination.

By Mr. Roberts:

Q. Do you know what it will do at 5:30 in the month of October on the Missouri River bottom?

A. I think at that time it would show some reflection.

Redirect examination.

By Mr. Parkinson:

Q. State whether or not you could tell how far it would be, a foot or ten feet or 15 feet?

A. No, sir, I couldn't.

Mr. Parkinson: That is all.

Witness excused.

Mr. Parkinson: It is admitted that Joseph J. Frese, the husband of the widow who is suing, the plaintiff administratrix, died as a result of the collision on the 30th of October, 1916.

JOHN J. KANE, being produced, sworn and examined as a witness on the part of the plaintiff, testified as follows, to-wit:

Direct examination.

By Mr. Parkinson:

Q. State your name please?

202 A. John J. Kane.

Q. What is your business?

A. I am manager of the Equitable Life Insurance Company.

Q. Are you in St. Joseph?

A. Yes, sir.

Q. Do you have in your possession the mortality tables showing the expectancy of life of men of various ages?

A. Yes, sir.

Q. Have you the tables with you?

A. Yes, sir.

Q. Will you examine those tables and tell us what the expectancy of life is of a man fifty-four years of age?

A. 54?

Q. Yes, 54. What is the expectancy of life?

A. 18 years and one month.

Mr. Parkinson: That is all.

Cross-examination.

By Mr. Roberts:

Q. That is according to what table?

A. According to the American Experience Table of Mortality.

Q. That is the average as I understand it?

203 A. Yes, sir; it is based on the law of average.

Q. As a matter of fact, do you know that the average is less among locomotive engineers and people following that profession?

A. Less than what?

A. That the expectancy is less as an average among locomotive engineers as a class?

A. We have no tables showing that.

Q. As an insurance man, you know that?

A. Yes, sir. There is an extra rate placed upon those men by having extra hazards.

Redirect examination.

By Mr. Parkinson:

Q. You mean by reason of the extra hazard they are more likely to be killed?

A. Yes, they are more likely to be killed on account of their occupation.

Mr. Parkinson: That is all.

ROBERT D. CALDWELL, recalled, further testified as follows

Direct examination.

By Mr. Parkinson:

204 Q. Pardon me, Mr. Caldwell, for calling you back so often. I want to ask you one thing. Will you tell the jury what the rate of increase in the pay of engineers has been since October, 1916?

Mr. Roberts: Defendant objects to that as not competent in this case. It does not prove or disprove any issue in the case.

The Court: Well, the objection is overruled.

To which ruling of the court defendant at the time excepted and still excepts.

Q. What is the rate of increase?

Mr. Roberts: Just a minute. Defendant makes the same objection for the reason which is given in the former objection.

The Court: I don't remember of any reason being given.

Mr. Roberts: Defendant objects for the reason that it does not prove or disprove any issue in this case, and is not competent for any purpose.

The Court: Objection overruled.

To which ruling of the court defendant at the time excepted and still excepts.

Mr. Parkinson: Proceed.

205 A. Well, I don't know the exact per cent, but a man that was making two hundred dollars a month at that time would be making now about \$270.00 or \$280.00.

Mr. Parkinson: That is all.

Mr. Parkinson: Plaintiff rests.

Mr. Roberts: Before plaintiff rests, I would like to recall Mr. Leslie for further cross examination.

Mr. J. R. LESLIE, recalled for further cross examination, testified as follows:

Recross-examination.

By Mr. Roberts:

Q. In this plat, Mr. Leslie, Plaintiff's Exhibit I, which you say you made, what is the distance from the crossing of the Wabash and Burlington tracks to the south end of this street near the bunk house?

A. The prolongation of the street line there, this line projected here, it is 249 feet.

Q. How wide is that street?

A. 40 feet going west.

Q. How far is it from the northeast end to a point opposite this bunk house?

A. 24.9 feet.

Q. How long is the bunk house?

A. 34 feet.

206 Q. What is the distance between the section house and the bunk house.

A. 9.4 feet.

Mr. Roberts: That is all.

Redirect examination.

By Mr. Parkinson:

Q. Where is the south line of this street?

A. There is one going east. There is a jog in the railroad track.

Q. This walk is on the north side?

A. Yes, the street going east.

Q. There is a street going west?

A. Yes, but a little farther over.

Q. That is still a walk on the north side?

A. No, that is on the south side.

Q. This jog?

A. Yes, sir.

Q. So the walk going across the tracks is on the north side of the track?

A. Yes, the street going east.

Q. The first crossing of the track, that is on the north side?

A. Yes.

Q. The line here is on the north line of this?

A. Yes, sir.

207 Cross-examination.

By Mr. Roberts:

Q. Does it jog at the bunk house?

A. The street is not traveled, that portion going east.

Q. Where is the traveled portion?

A. Just south of the sidewalk.

Q. Which way is this mark from the traveled portion?

A. That is south of the traveled portion.

Mr. Roberts: That is all.

Redirect examination.

By Mr. Parkinson:

Q. Why didn't you indicate it, the traveled line of the street, on the map?

A. The original plat of the town doesn't show the street lines going across the railroad there.

Mr. Parkinson: That is all.

Witness excused.

Mr. Parkinson: We offer in evidence Plaintiff's Exhibit J and Exhibit K.

The Court: Consider them in evidence.

(Owing to the great number of exhibits introduced, said exhibit is printed in separate volume.)

Thereupon the plaintiff rested her case.

At the close of the evidence on the part of the plaintiff the defendant asked the court to give to the jury a written instruction as follows: "No. A. Now at the close of plaintiff's evidence the court instructs the jury under the law and the evidence, your verdict must be for the defendant."

Which said instruction in the nature of a demurrer to the evidence was by the court refused and overruled, to which action of the court in overruling said demurrer, and in refusing to give said instructions, defendant at the time there objected and excepted, and still objects and excepts.

Thereupon the defendant to sustain the issues on its part offered and introduced the following testimony, to-wit:

Mr. Roberts: Defendant offers in evidence a certified copy of the petition of Johanna Frese, Administratrix of the Estate of Joseph J. Frese, deceased, against the Wabash Railroad Company, filed in the Circuit Court of Livingston County and now pending in that court, which is marked Defendant's Exhibit No. 6.

The Court: Is this the same plaintiff?

Mr. Roberts: Yes.

The Court: It is a suit against the Wabash?

Mr. Roberts: Yes, sir.

The Court: You may consider it in evidence.

Thereupon said petition was read to the jury.

Which said petition marked defendant's Exhibit No. 6 is in words and figures as follows, to-wit:

In the Circuit Court of the State of Missouri Within and for Livingston County, to the January, 1918, Term Thereof.

JOHANNA FRESE, Administratrix of the Estate of Joseph J. Frese,
Plaintiff,

vs.

THE WABASH RAILWAY COMPANY, Defendant.

210 Plaintiff for a cause of action states that during his lifetime she was the wife of and is now the widow of Joseph J. Frese, deceased, who died as the result of injuries inflicted as hereinafter set forth on the 30th day of October, 1916, with his mansion house and principal place of abode in the City of Quincy, Adams County, Illinois; that by the County Court of Adams County, Illinois, it being the Court having jurisdiction of Probate matters, she has been duly and regularly appointed Administratrix of the estate of Joseph J. Frese, deceased, and letters of administration have been duly and

regularly issued to her by said Court; that at the time of his death Joseph J. Frese left surviving him his widow Johanna Frese, and the following children: Helen Frese, a daughter, age 25 years; Selma Kron née Frese, a daughter, age 22 years; Albert Frese, a son, age 20 years; Joseph Frese, a son, age 18 years; Herbert Frese, a son, age 15 years; Ruth Frese, a daughter, age 5 years; that he left surviving him no other children or descendent of a deceased child; that in his life time he was the sole support and maintenance of the plaintiff and his children, and at all times prior to his death was an able-bodied, intelligent and healthful man, earning wages in excess of \$200.00 per month, and with opportunities for and ability
211 to increase his earning capacity, and at the time of his death was 54 years of age; that all the times herein mentioned the defendant was and now is a railroad corporation duly organized and operating a line of railroad in, to and through the states of Illinois, Missouri and other states, and in, to and through the city or town of Hull, in Pike County, Illinois; that at all the times herein mentioned, and particularly on the 30th day of October, 1916, the defendant maintained a railroad track running in, to and through the town of Hull, and in, to and through Pike County, Illinois, and crossing the railroad tracks of the Chicago, Burlington & Quincy Railroad Company; that the railroad track of the defendant Company at and for a considerable distance on each side of its intersection with the track of the Chicago, Burlington & Quincy Railroad Company runs in an easterly and westerly direction in a straight line; that the railroad track of the Chicago, Burlington & Quincy Railroad Company at and for a considerable distance on each side of its intersection with the track of the defendant Company runs in a southeasterly and northwesterly direction in a straight line; that at all the times herein mentioned there was in force and effect in the State of Illinois a law or laws in words and figures as follows:

212 "Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

"Every such action shall be brought by and in the names of the personal representatives of such deceased person and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law. In relation to the distribution of personal property left by persons dying intestate and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person not exceeding the sum of \$10,000."

213 That by said law a cause of action for the negligent killing of Joseph J. Frese, as hereinafter set forth, exists with the plaintiff as Administratrix of the estate of Joseph J. Frese for the exclusive benefit of the widow and next of kin of said Joseph J. Frese.

Plaintiff further states that on the 30th day of October, 1916, and prior thereto Joseph J. Frese was in the employ of the Chicago, Burlington & Quincy Railroad Company as a locomotive engineer, and engaged in interstate commerce and working in interstate commerce; that on said 30th day of October, 1916, Joseph J. Frese, while in the exercise of care, and in the performance of his duties, and engaged in moving a locomotive engine and train of cars upon which he was an employe of said Chicago, Burlington & Quincy Railroad Company on the tracks of said Company in Pike County, Illinois, where they cross the tracks of the defendant Company, was injured as a result of which injuries he died on said 30th day of October, 1916, by and through the negligence of the defendant Company and its officers, agents and employes in carelessly and negligently operating an engine and train of cars upon the tracks of the Wabash Railway Company in a westerly direction approaching and

onto the said crossing, and into collision with the engine upon which Joseph J. Frese was working as an employe of the Chicago, Burlington & Quincy Railroad Company; that at the time of his death the said Joseph J. Frese was under the legal obligation of supporting the plaintiff, his widow, and his minor children; and at all the times previous to his death he had provided for the support and maintenance of his said wife and all of his children and for their education, care and training, that by his death the plaintiff, as the widow of Joseph J. Frese, has lost the society of her husband and support and maintenance by him, and his minor children have lost the care of their father in their education and in their training, and his children have lost the support and maintenance that otherwise would have been furnished them and would have been contributed by him but for his negligent killing by the defendant as hereinabove set forth.

That by reason of the above and foregoing plaintiff, as the widow of Joseph J. Frese, and his children, to-wit, Helen Frese, Selma Kron née Frese, Albert Frese, Joseph Frese, Herbert Frese and Ruth Frese, and the estate of Joseph J. Frese, and the plaintiff as Administratrix of the estate of Joseph J. Frese have been damaged in the sum of Ten Thousand Dollars.

215 Wherefore plaintiff prays judgment against the defendant in the sum of Ten Thousand Dollars and for her costs in this behalf expended.

MYTTON & PARKINSON,
Attorneys for Plaintiff.

STATE OF MISSOURI,
County of Livingston, ss:

I, Byrd L. Hamblin, Clerk of the Circuit Court within and for the County in the State aforesaid, do hereby certify that the above

and foregoing is a true copy of the petition in the foregoing cause as the same appears on file and of record in my office.

Witness my hand and seal of said court at office in Chillicothe, this 15th day of February, 1919.

[SEAL.]

BYRD L. HAMBLIN,
Circuit Clerk.

Mr. Roberts: Defendant offers in evidence two sections of the laws of the state of Illinois in force and effect on October 30, 1916, being section- 12 and 13 of an act entitled "An Act in relation to operating railroad trains" approved March 31, 1874 and amended in 216 1885 and still in full force and effect, as shown by section 75 of chapter 114 of Hurd's Revised Statutes of Illinois for 1916, duly certified to by the Secretary of State.

The Court: You identify it as an exhibit what?

Mr. Roberts: Defendant's Exhibit No. 7.

The Court: Consider it in evidence.

Thereupon the said exhibit was read to the jury.

Which said copy of the laws of the state of Illinois, marked Defendant's Exhibit No. 7, are in words and figures as follows:

Certificate Number 1125.

State of Illinois,

Office of the Secretary of State.

To all whom these presents shall come, Greeting:

I, Louis L. Emmerson, Secretary of State of the State of Illinois, do hereby certify that the following and hereto attached is a true copy of true copy of Sections 12 and 13 of an Act entitled 217 "An Act in relation to fencing and operating railroads," approved March 31, 1874, as amended by Act approved June 19, 1885 and still in force, and as shown by Sections 75 and 76 of Chapter 114, Hurd's Revised Statutes of Illinois for 1916.

In testimony whereof, I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois. Done at the City of Springfield this 12th day of February A. D. 1918.

LOUIS L. EMMERSON,
Secretary of State.

An Act in Relation to Fencing and Operating Railroads.

(Approved March 31, 1874. In Force July 1, 1874.)

75. Draw Bridge—Railroad Crossing, etc.—(Stop.)—12. All trains running on any railroad in this State, when approaching a crossing with another railroad upon the same level, or when ap-

proaching a swing or draw bridge, in use as such, shall be brought to a full stop before reaching the same, and within eight hundred (800) feet therefrom, and the engineer or other person in charge of the engine attached to the train shall positively ascertain that the way is clear and that the train can safely resume its course before proceeding to pass the bridge or crossing. (As amended by act approved June 19, 1885. In force July 1, 1885. L. 1885, Legal News Ed. p. 177.

76. Penalty.—13. Every engineer or other person having charge of such engine, violating the provisions of the preceding section, shall be liable to a penalty of two hundred dollars for each offense, to be recovered in an action of debt in the name of the People of the State of Illinois, and the corporation on whose road such offense is committed, shall be liable to a penalty of not exceeding two hundred dollars, to be recovered in like manner, the amount so recovered to be paid into the treasury of the county in which the offense occurs, but no recovery shall be had in any case for any offense committed more than sixty days prior to the commencement of the action. The provisions of this and of the preceding section shall extend to and govern all cases of neglect or failure to stop the train as required by law before passing any bridge or railroad crossing, whether occurring before or after the said provisions shall take effect, and no act or part of an act inconsistent with such operation and effect being given to this law shall in any way apply hereto. (As amended by act approved June 19, 1885. In force July 1, 1885. L. 1885, Legal News Ed. p. 178.

Mr. Roberts: Defendant offers in evidence a notice served by Mytton & Parkinson, attorneys for plaintiff in this case, served upon the Chicago, Burlington & Quincy Railroad Company and acknowledged by M. G. Roberts, its attorney, to take depositions at Quincy, Illinois, January 10, 1917 in this case, and defendant offers in evidence the certificate of the notary public, for the purpose of showing that the plaintiff in this case at the city of Quincy in the state of Illinois, took the depositions of Amos Abbott, W. A. Kearney, Elmer Applegate and John William Savage.

Mr. Parkinson: We object to it, your honor, on the ground it is incompetent for any purpose. It does not tend to prove or disprove any issue in this case.

The Court: The purpose is to show the depositions were taken but were not used—

Mr. Roberts: I am offering it for a different purpose. I don't want to tie myself up.

Mr. Parkinson: We will offer it if he will state that is his purpose.

Mr. Roberts: The court and counsel understand my purpose in offering it.

220 Mr. Parkinson: Your honor stated what the purpose is.

Mr. Roberts: I am offering it for a different purpose.

Mr. Parkinson: We say it is not competent for any purpose.

Mr. Roberts: I do not care to argue it.

Mr. Parkinson: If he wants the deposition, we will introduce it.

The Court: Under the general rule, I assume it would be competent for the purpose of showing——

Mr. Roberts: Does your honor sustain the objection?

The Court: I was only saying as far as any reason I can see, it would be competent. That is, it is competent upon the ground generally that where depositions have been taken of witnesses who are non-residents, therefore they are entitled to be submitted to the jury. The offer of the subpoenaing of a witness is competent evidence.

Mr. Parkinson: We cannot offer this in evidence for the reason that we showed that Mr. Savage and the other men mentioned in the deposition were here.

The Court: That can be taken up later.

221 Mr. Parkinson: He is only offering the notice to take depositions.

Mr. Roberts: To show that the plaintiff took it.

Mr. Parkinson: We took the deposition but what is that competent for in this case. We couldn't introduce them for they were present, and it has been shown the witnesses here.

The Court: It has been shown *that* the witness Savage.

Mr. Roberts: I will exclude the notice to take the others and offer it for the purpose of showing that he issued it for the purpose of taking the deposition of John William Savage.

The Court: And who is present here in court at this time.

Mr. Roberts: The testimony as to that of record.

The Court: Objection sustained.

To which ruling of the court defendant objected and excepted at the time, and still objects and excepts.

Thereupon the defendant rested its case.

222 Mr. Parkinson: We offer in evidence deposition of Mr. Savage taken under notice given by the plaintiff.

Mr. Roberts: We object because the witness is here.

The Court: Objection sustained.

The Court: Defendant rests. Is there anything in rebuttal.

Mr. Parkinson: No, sir. That is all.

This was all the testimony offered in the case.

Thereupon at the close of all the evidence the defendant requested the court to instruct the jury as follows:

No. B. Now at the close of all the evidence in the case, the court instructs the jury that under the law and the evidence, your verdict must be for the defendant.

Which said instruction No. B, the court refused to give to the jury, to which action of the court the defendant then and there excepted at the time.

223 Thereupon the plaintiff requested the court to give instructions Nos. from 1 to 8, inclusive, which the court gave, to which action of the court in giving said instructions and each of them, defendant there at the time objected and excepted.

Thereupon the defendant requested the court to give instructions Nos. 1 to 5 inclusive, which the court gave.

Thereupon the defendant requested the court to give to the jury instructions Nos. C. D. E. F. and G. which the court refused to do, to which action of the court in refusing to give said instructions and each of them, the defendant then and there at the time objected and excepted.

Which said instructions No- 1 to 8 inclusive, given on the part of the plaintiff are in words and figures as follows, to-wit:

No. 1.

The court instructs the jury that Johanna Frese is the duly and regularly appointed administratrix of the estate of Joseph J. Frese deceased, and you are further instructed that the defendant on the 30th day of October 1916, was engaged as a common carrier by railroad in interstate commerce in the operation of its trains, mentioned in evidence, over its line of railway through the town

224 of Halls, mentioned in evidence, and you are further instructed that Joseph J. Frese, as an engineer in charge of the defendant company's engine and train, mentioned in evidence, was working in interstate commerce, and you are further instructed that if you find and believe from the evidence that at the time of his death Joseph J. Frese left surviving him, Johanna Frese, his widow, and the minor children, mentioned in evidence, and that said widow and minor children were dependent upon him for support and maintenance, and you further find from the evidence that on the 30th day of October, 1916, Savage, mentioned in evidence, was the defendant's fireman on the engine mentioned in evidence, and that it was a part of the duties of the fireman Savage, mentioned in evidence, (provided you so find) while approaching the railroad crossing mentioned in evidence, to keep a lookout for trains approaching said crossing from the east, traveling in a westerly direction, upon said Wabash tracks, and to notify the engineer in charge of said engine of the approach of any engine or cars along the Wabash track, and you further find from the evidence that the fireman Savage (provided you so find) in the exercise of ordinary

care and in the performance of his duties would have seen
225 the Wabash engine and train, mentioned in evidence, approaching said crossing and known that it was likely to come into collision with the train upon which he was fireman in time to have notified Joseph J. Frese so that Joseph J. Frese in the exercise of ordinary care could have stopped his engine and avoided a collision, and you further find from the evidence that said fireman Savage, (provided you find he was the fireman) carelessly and negligently failed to keep a lookout for engines or trains approaching the railroad crossing upon the Wabash track from the East, and that on account of his carelessness and negligence (provided you so find) Joseph J. Frese, while in the exercise of care and caution, caused the engine he was in charge of to be run along the track of the defendant company and into collision with the engine operated

the line of the Wabash track, mentioned in evidence, thereby sustaining injuries from which he then and there died, then your verdict will be for the plaintiff.

No. 2.

The court instructs the jury that if you find and believe from the evidence that Savage, mentioned in evidence, was the defendant company's fireman upon the engine of defendant's train in charge of Joseph J. Frese, and you further find from the evidence that it was a part of the duties of Savage, as fireman, (provided you so find) to keep a lookout for trains approaching the railroad crossing, mentioned in evidence, from the east, traveling in a westerly direction upon said Wabash tracks, and to notify the engineer in charge of said engine of the approach of any engine or cars along the Wabash track, and you further find from the evidence that the fireman Savage (provided you so find) in the exercise of ordinary care and in the performance of his duties would have seen the Wabash engine and train mentioned in evidence, approaching said crossing, and known that it was likely to come into collision with the train upon which he was fireman in time to have notified Joseph J. Frese, so that Joseph J. Frese in the exercise of ordinary care could have stopped his engine and avoided a collision, and you further find from the evidence that said fireman Savage carelessly and negligently failed to keep a lookout for engines or trains approaching the railroad crossing upon the Wabash track from the east, and that on account of his carelessness and negligence (provided you so find) Joseph J. Frese caused the engine he was in charge of to be run along the track of the defendant company and into collision with the engine operated on the line of the Wabash track, mentioned in evidence, thereby sustaining injuries from which he then and there died, then your verdict will be for the plaintiff, even though you believe from the evidence that Joseph J. Frese was guilty of negligence directly contributing to the injuries from which he died.

No. 3.

The court instructs the jury that it was the duty of Joseph J. Frese, in charge of the engine of defendant company, to bring his train to a full stop before reaching the railroad crossing mentioned in evidence, and within eight hundred feet therefrom, and to positively ascertain that the way was clear and the train could safely resume its course before proceeding to pass the crossing, and you are further instructed that it is your duty and province to determine and find from all the facts and circumstances in evidence whether or not the deceased, Joseph J. Frese, did bring his train to a full stop within eight hundred feet of the railroad crossing, and did positively ascertain that the way was clear and that his train could safely resume its course before proceeding to pass the crossing.

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No. 4.

The court instructs the jury that by the term "negligently," as used in these instructions is meant the failure to exercise ordinary care; and by "ordinary care" is meant such care as would be used by any ordinarily prudent person under like and similar circumstances.

No. 5.

The court instructs the jury that by the term "contributory negligence" as used in these instructions, is meant such carelessness or negligence, if any, on the part of the deceased as directly contributed to or caused his injury and death; and the court instructs you that if your verdict be for the plaintiff, then, even if you find that the deceased was guilty of contributory negligence, as defined herein, that facts will not bar a recovery in this case; but in the event you find for plaintiff, and also find that the deceased was guilty of contributory negligence, you should diminish the damages, if any, awarded to the plaintiff, in proportion to the amount of negligence attributable to the deceased; so that plaintiff will not recover full damages, but only a proportional part bearing
 229 the same relation to the full amount as the negligence attributable to the defendant bears to the entire negligence attributable to both defendant and deceased, as shown by the evidence.

No. 6.

The court instructs the jury that if your verdict be for the plaintiff, and you find that deceased was in the exercise of ordinary care at the time of his death, and was not guilty of contributory negligence; that is, such carelessness or negligence on his part as directly contributed to or caused his injury and death, then in assessing plaintiff's damages you may allow such sum as you believe from the evidence represents the present cash value of such future pecuniary benefits, if any, as the widow and dependent minor children of deceased, mentioned in evidence, were deprived of by his death, during the lifetime of Johanna Frese and the minority of his dependent minor children; and in so doing you may take into account the age, habits, ability, earning capacity, and probable duration of life of deceased, as shown by the evidence; together with the loss by his said widow and dependent minor children of their support and maintenance by him, if any, as well as other
 230 pecuniary advantages which they would have derived from the continuance of the life of said Joseph J. Frese, of any; and in arriving at the amount of pecuniary damages sustained by said minor children, if any, you may take into consideration the loss to them of the care and education of their father, the said Joseph J. Frese, by reason of his death, provided you find they have suffered the loss of care and education on account of his said

death; and in assessing damages you should make adequate allowance, under the circumstances, for the earning power of money.

No. 7.

The court instructs the jury that nine or more of your number concurring may return a verdict; and if the verdict is agreed upon by nine or more and less than twelve it will be signed by those concurring in it, but if the verdict is unanimous it will be signed by the foreman alone.

No. 8.

The court instructs the jury that if you find for plaintiff your verdict will be in the following form upon another piece of paper:

231 JOHANNA FRESE, Administratrix of the Estate of Joseph J. Frese, Deceased, Plaintiff,

VS.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Defendant.

We, the jury in the above entitled cause, find for the plaintiff in the sum of — Dollars.

To the action of the court in giving said instructions No. 1 to 8 inclusive and each of them, the defendant then and there excepted.

Which said instructions given on the part of the defendant, are in words and figures as follows, to-wit:

No. 1.

The court instructs the jury that this case should be considered by them the same as if it were a controversy between two persons of equal standing in the community. The fact that one of the parties

232 is a corporation should not influence your mind in any way, but the right of the parties should and must be determined upon the evidence introduced in the case and the instructions given to the jury, which is the law and only law to guide you in your deliberations.

No. 2.

The court instructs the jury that mere proof that the decedent, J. J. Frese, was killed in a collision is in and of itself no evidence whatever that his death was caused by the carelessness of the defendant. The mere fact that the decedent was killed while in the service of the defendant does not make the defendant liable in damages to the plaintiff in this case.

No. 3.

The court instructs the jury that the burden of proof in this case is upon the plaintiff to prove by a preponderance of the evidence, that is, to prove to your reasonable satisfaction by testimony that the death of J. J. Frese was caused by the carelessness and negligence of the fireman on the Burlington train, as explained in other instructions herein. And unless the plaintiff has so proven her

233 case to your reasonable satisfaction and to a reasonable certainty, then the plaintiff cannot recover and your verdict must be for the defendant.

No. 4.

The court instructs the jury that carelessness or negligence as used in these instructions cannot be presumed by the jury but must be proven by the plaintiff to the reasonable satisfaction of the jury. And it is not sufficient for the plaintiff to show that the fireman on the Burlington engine was careless or negligent. Before you can find a verdict for the plaintiff you must further find from the evidence in the case that the carelessness of the fireman, if any, as explained in other instructions herein was the proximate cause of the death of J. J. Frese, without which it would not have occurred.

No. 5.

The court instructs the jury that if your verdict be for the defendant it shall be in the following form:

"JOHANNA FRESE, Administratrix of the Estate of Joseph J. Frese,
Deceased, Plaintiff,

234

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Defendant

We, the jury in the above entitled cause, find for the Defendant.

Foreman."

Which said instructions, C. D. E. F. and G, asked by the defendant and refused by the court, to which action the defendant then and there excepted, are in words and figures as follows:

No. C.

The court instructs the jury that under the law it was the duty of the decedent, Joseph J. Frese as engineer of the Burlington train mentioned in evidence, to positively ascertain that the way was clear and that his train could cross in safety before proceeding over the Wabash crossing.

If, therefore, you find and believe from the evidence that his death was caused by his failure to positively ascertain that the crossing was clear and that he could proceed over the same in safety, then you will return a verdict for the defendant.

No. D.

The court further instructs the jury that if you find and believe from the evidence in this case that the engineer in charge of the Wabash train did not positively ascertain that the crossing was clear and that he could pass over the same in safety before proceeding over the Burlington crossing and that such act on his part was the cause of the death of the said Joseph J. Frese, then plaintiff cannot recover against the Chicago, Burlington & Quincy Railroad Company and your verdict must be for the defendant.

No. E.

The court instructs the jury that if you find and believe from the evidence that the death of Joseph J. Frese was due to and caused by the failure of either the engineer of the Burlington train or the engineer of the Wabash train, or both of them, to positively ascertain that the way was clear and that their trains could safely pass over the crossing, then the plaintiff cannot recover in this case and your verdict must be for the defendant.

236

No. F.

The court instructs the jury that Joseph J. Frese, the decedent, was the engineer in charge of the Burlington engine, and you are further instructed that the duty which the law placed upon him to positively ascertain that the way was clear and the crossing safe before proceeding thereon with his train, was a personal duty which the law cast upon him and that he could not delegate or place that duty upon the fireman.

No. G.

The court instructs the jury that the law presumes that the fireman on the Burlington engine was in the exercise of due care and it devolves upon the plaintiff to prove by competent testimony that his carelessness or negligence was the proximate cause of the death of the said Joseph J. Frese.

To the action of the court in refusing to give said instructions C, D, E, F, and G, and each of them, the defendant then and there excepted.

Thereupon the jury after hearing the argument of counsel and the instructions of the court, retire to consider of their verdict and now here on the 18th day of February, 1919, return into open court the following verdict, to-wit:

JOHANNA FRESE, Administratrix of the Estate of Joseph J. Frese,
Deceased, Plaintiff,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Defendant.

We, the jury in the above entitled cause, find for the plaintiff in the sum of Twelve Thousand (\$12,000.00) Dollars.

G. O. MAXWELL,
Foreman.

And afterwards, on the 29th day of February, 1919, and during said January, 1919, term of said court, and within four days after the filing of said verdict, comes the defendant and files its motion for a new trial, in words and figures as follows, to-wit:

238 In the Circuit Court of Buchanan County, Missouri, January Term, A. D. 1919.

JOHANNA FRESE, Administratrix of the Estate of Joseph J. Frese,
Deceased, Plaintiff,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Defendant.

Motion for New Trial.

Now comes the Chicago, Burlington & Quincy Railroad Company, defendant in the above entitled cause, and moves the court to set aside the verdict herein and grant it a new trial for the following reasons, to-wit:

1st. Because the court erred in refusing to give to the jury the instruction in the nature of a demurrer to the evidence offered at the close of plaintiff's case, being instruction No. A.

2d. Because the court erred in refusing to give to the jury the instruction in the nature of a demurrer to the evidence offered at the close of all the evidence in the case, being defendant's instruction No. B.

3d. Because the court erred in refusing to give to the jury defendant's refused instructions numbered A, B, C, D, E, F and G.

4th. Because the court erred in giving to the jury plaintiff's instructions No. 1, No. 2, No. 3, No. 4, No. 5, No. 6, No. 7 and No. 8.

5th. Because the court erred in admitting incompetent, irrelevant and immaterial testimony and evidence offered by the plaintiff.

6th. Because the court erred in excluding competent, material and relevant evidence offered by the defendant.

7th. Because the plaintiff has no legal capacity to sue in the courts of the state of Missouri.

8th. Because the verdict is the result of passion and prejudice on the part of the jury.

240 9th. Because the verdict is without substantial evidence to support the same.

10th. Because the plaintiff's second amended petition does not state sufficient facts to constitute a cause of action against the defendant.

11th. Because no evidence or testimony was introduced showing any negligence on the part of the defendant.

12th. Because the court erred in refusing to give the instructions in the nature of demurrer to the evidence asked by defendant on the ground that the plaintiff had no legal capacity to sue in the courts of Missouri.

CHICAGO, BURLINGTON & QUINCY
RAILROAD COMPANY,

By H. J. NELSON,
E. M. SPENCER, AND
M. G. ROBERTS,

Its Attorneys.

And afterwards on said 20th day of February, 1919, it being at said January, 1919, term of said court, and within four days
241 after the rendition of the verdict, by the jury, comes the defendant by its attorney and files motion in arrest of judgment. Which said motion is in words and figures as follows, to-wit:

In the Circuit Court of Buchanan County, Missouri, January Term,
A. D. 1919.

JOHANNA FRESE, Administratrix of the Estate of Joseph J. Frese,
Deceased, Plaintiff,

VS.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Defendant.

Motion in Arrest.

Now comes the Chicago, Burlington & Quincy Railroad Company, defendant in the above entitled cause, and moves the court to arrest the judgment herein for the reasons following:

1st. Because the plaintiff's second amended petition does
242 not state sufficient facts to constitute a cause of action against the defendant.

2d. Because the judgment is erroneous.

3d. Because it appears upon the face of the record that the judgment should have been for the defendant.

4th. Because the plaintiff has no legal capacity to sue in the courts of the state of Missouri.

CHICAGO, BURLINGTON & QUINCY
RAILROAD COMPANY,

By H. J. NELSON,
E. M. SPENCER, AND
M. G. ROBERTS,

Its Attorneys.

And afterwards on the 14th day of March, 1919, at and during said January, 1919, term of said court, said motion for a new trial was taken up, submitted to the court and by the court overruled.

To which action of the court in overruling said motion for a new trial defendant then and there at the time objected and ex-
243 cepted, and still objects and excepts.

And afterwards on said 14th day of March, 1919, at and during said January, 1919, term of said court, said motion in arrest of judgment was taken up, submitted to the court, and by the court overruled.

To which action of the court in overruling said motion in arrest of judgment, defendant then and there at the time objected and excepted, and still objects and excepts.

And afterwards, on said 14th day of March, 1919, at and during said January, 1919, term of said court, the defendant filed its application for an appeal to the Supreme Court of the State of Missouri, which said application was on said date allowed by the court and an appeal to the Supreme Court of the State of Missouri granted.

Which said application for an appeal is in words and figures as follows, to-wit:

In the Circuit Court of Buchanan County, Missouri, January Term,
1919.

JOHANNA FRESE, Administratrix of the Estate of Joseph J. Frese,
Deceased, Plaintiff,

244

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Defendant.

Application and Affidavit for Appeal.

Comes now the Chicago, Burlington & Quincy Railroad Company, defendant herein, and prays the court to grant it an appeal from the judgment and decision of this court in this cause to the Supreme Court of the State of Missouri, and states that this appeal is not taken for vexation or delay, but because the defendant is aggrieved by the judgment and decision of the court, and the defendant now

here tenders the docket fee of Ten (\$10.00) Dollars as required by law and deposits the same with the clerk of this court.

CHICAGO, BURLINGTON & QUINCY
RAILROAD COMPANY,

By E. M. SPENCER AND
M. G. ROBERTS,

Its Attorneys.

STATE OF MISSOURI,

County of Buchanan, ss:

245 M. G. Roberts, of lawful age, having been duly sworn, upon his oath states that he is the agent and attorney of the Chicago, Burlington & Quincy Railroad Company, defendant and appellant in the above entitled cause, and is authorized to make this affidavit in its behalf and that the appeal of said defendant and appellant is not made for vexation or delay, but because the agent believes that said appellant is aggrieved by the judgment and decision of the court in said cause.

M. G. ROBERTS.

Subscribed and sworn to before me this 14th day of March, 1919.

[SEAL.]

RALPH J. HOWARD,

Notary Public Within and for Buchanan County, Mo.

My Commission expires on the 3rd day of August, 1922.

And afterwards on said 14th day of March, 1919, it being during said January, 1919, term of said court the defendant was granted leave to file its bill of exceptions during the next regular May, 1919, term of this court.

And afterwards on said 14th day of March, 1919, and during the January, 1919, term of said court, the court by its order of
246 record fixed the appeal bond in this case at twenty five thousand dollars (25,000.00), which said appeal bond was thereafter, to-wit, on the 22nd day of March, 1919, and during the said January, 1919, term of this court filed and by the court in open court approved on said 22nd day of March, 1919.

Now, on this 3d day of June, 1920, and during said May, 1920 term of said Circuit Court, and within the time in which defendant was given leave to file its bill of exceptions herein, comes the defendant and presents this, its bill of exceptions, and prays the court to sign, seal and order the same filed and made part of the record herein, all of which is accordingly done by the court on this 3d day of June, 1920.

THOMAS B. ALLEN,

Judge of the Circuit Court of Buchanan County,

State of Missouri, Division No. 1.

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266 And thereafter, on the 4th day of January, 1921, the following proceedings were had and entered of record in said cause, to-wit:

In the Supreme Court of Missouri, Division No. 1, October Term, 1920.

JOHANNA FRESE, Administratrix of the Estate of Joseph J. Frese.
Deceased, Respondent,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Appellant.

Come now the said parties, by attorneys, and submit this cause to the Court on briefs; and, upon motion, the Court doth grant leave of five days to the said appellant to file its reply brief herein.

And thereafter, and on the 5th day of March, 1921, the following further proceedings were had and entered of record in said cause, to-wit:

In the Supreme Court of Missouri, Division No. 1, October Term,
1920.

JOHANNA FRESE, Administratrix of the Estate of Joseph J. Frese, De-
ceased, Respondent,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Appellant.

Appeal from the Circuit Court of Buchanan County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Buchanan County rendered, be reversed, annulled and for naught held and esteemed. It is further considered and adjudged by the Court that the said respondent take nothing by her suit in this behalf, and that the said appellant be discharged and go hence without day, and recover against the said respondent its costs and charges herein expended and have execution therefor. (Opinion filed.)

Which said opinion is in the words and figures following, to-wit:

267 In the Supreme Court of the State of Missouri, Division No.
1., October Term, 1920.

No. 21660.

JOHANNA FRESE, Administratrix, etc., Respondent,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD Co., Appellant.

Statement.

This suit was instituted in the Circuit Court of Buchanan County by the plaintiff against the defendant to recover damages for the alleged negligence of the latter in killing the former's husband. The trial resulted in verdict and judgment for the plaintiff in the sum of \$12,000.00, and in proper time and manner the defendant appealed the cause to this court.

Counsel for both plaintiff and defendant have made a full and fair statement of the case in their respective briefs, but we will adopt that of plaintiff, as it probably more clearly emphasizes the points presented for consideration, which is as follows:

This is an action by Johanna Frese administratrix of the estate of Joseph J. Frese, deceased, to recover compensation under the Federal Employers' Liability Act for the benefit of herself, as his widow, and their children, on account of his death on the 30th day of October,

1916, from injuries inflicted on that date at Halls, Illinois, while he was a locomotive engineer in the employ of the defendant company and operating one of its trains, by reason and on account of the negligence of the defendant company through its fireman, Savage, on account of said train being run into collision with a train operated by the Wabash Railroad Company.

At the time of his death Joseph J. Frese had his mansion house and principal place of abode in Adams County, Illinois, and Mrs. Frese was appointed administratrix in the court of that county having probate jurisdiction, and instituted this suit in the Circuit Court of Buchanan County, Missouri.

The tracks of the Chicago, Burlington & Quincy Railroad Company at Halls run from northwest to southeast in a straight line and cross at grade the tracks of the Wabash Railroad Company, which run directly east and west.

North of the Wabash tracks and east of the Burlington tracks a joint depot is located, the southwest corner of which is seventeen feet two inches from the east rail of the Chicago, Burlington & Quincy Railroad Company track. The depot is twenty-two feet four inches in width, and fifty-two feet six inches in length, and is in a position at an angle to both tracks and not parallel with either.

The plaintiff's Exhibits "L" and "J," being plats produced by the plaintiff and defendant, respectively, each very accurately show the physical situation (but which are too extensive to be set out here).

A transfer track running from the Chicago, Burlington & Quincy Railroad Company track to the Wabash track north of the depot

leaves the Burlington track at a switch point three hundred
269 fifty-five feet northwest of the crossing, and with the frog formed by the transfer track and the Burlington track a distance of two hundred eighty-three feet northwest of the crossing, running into the Wabash track at a switch point distant from the railroad crossing along the Wabash Railroad three hundred fifty-five feet six inches, with the frog point formed by the transfer track and the Wabash track at a point two hundred eighty-one feet six inches east of the crossing along the Wabash Railway. The length of this transfer track from frog point to frog point is five hundred forty-two feet six inches, and it bends so that it parallels the northeast side of the depot at a distance fifteen feet therefrom.

North of this transfer track and in the bend are a number of buildings. Northwest of the depot and between the Burlington track and the transfer track is a coal shed, indicated on the map, ten feet high, seven feet four inches wide and fourteen feet long, located fifteen feet from the Burlington track and six feet from the transfer track. The buildings north of the transfer track and the depot and coal shed mentioned in evidence, obstruct a view from the engine of a train approaching the crossing along the Chicago, Burlington & Quincy Railroad from the northwest of any train which may be coming from the east along the Wabash track approaching the crossing, so that a view may be had only intermittently.

At a point two hundred and forty feet from the crossing northwest along the Burlington tracks a view may be had looking north and

270 east of the depot of a person standing east from the crossing upon the Wabash track one hundred and fifteen feet therefrom, and not at any place closer to the crossing, and from that point east to a point upon the Wabash track two hundred and thirty-seven feet from the crossing and not at a point beyond that to the east.

From a point two hundred and seventy-six feet northwest along the Burlington track from the crossing a view may be had looking north and east of the depot of a man standing upon the Wabash track east from the crossing one hundred and nine feet and not closer and east from the crossing one hundred and ninety-seven feet and not beyond that point to the east. As you approach the crossing from the northwest along the Burlington track closer than two hundred and forty feet, the view of the Wabash track becomes intermittently obstructed by the coal shed and the depot until a train approaching from the east on the Wabash track could only be seen south of the depot and practically on the crossing.

The evidence of the witness Leslie on cross-examination shows that at a point one hundred and ninety-seven feet from the crossing northwest along the track of the Chicago, Burlington & Quincy Railroad you could see a train on the Wabash track if there had been one there, but he says nothing to show at what point upon the Wabash track the train had to be to be seen. His evidence also showed that if the pilot of the engine was at a point one hundred and ninety-seven feet from the crossing, the fireman in the cab would be sixteen to eighteen feet farther to the north and that from that point you could see a train on the Wabash track looking north of the station, but his evidence does not in any way indicate where the train would be on the Wabash track.

271 On the 30th day of October, 1916, Joseph J. Frese, as locomotive engineer, and Savage, as fireman, in the employ of the Burlington Railroad, were running a mixed train consisting of six or eight freight cars and two passenger coaches in interstate commerce from the northwest, traveling southeast, approaching the depot and crossing at Hulls about 5:30 in the evening. The pilot of the engine was brought to a stop twelve or fifteen feet northwest of the stop post, as it then existed, located at the northeast corner of the section house, a distance of one hundred and ninety-seven feet northwest from the crossing.

Giving heed to the evidence of McGee as to where the stop post was then located and also as to where the engine stopped with reference to the road, and the evidence of Leslie as to the length back from the pilot the fireman is when sitting in the engine, this would place the fireman about two hundred and thirty or two hundred and forty feet northwest of the crossing.

The whistle upon the Burlington engine was sounded twice. No sounding of a whistle of the engine on the Wabash track was heard by the witness standing by the Burlington engine.

The evidence of the Wabash engineer, Long, was that at a point about three hundred feet east of the crossing he stopped his engine and freight train and whistled twice. The probable deduction from

the evidence of the two witnesses, and the fact, was that the two engines whistled simultaneously. The Burlington engine then proceeded southeast along the track at a rate of speed of six or seven miles an hour, intending to stop with the train at the depot, which would throw the engine some little distance across the Wabash track to the southeast. The Wabash train proceeded west toward the crossing at a rate of speed estimated by the engineer of eight miles an hour. The pilots of the engines met at the crossing, derailling and turning over the Burlington engine and killing Frese, the locomotive engineer upon the Burlington train. The collision occurred at about 5:30 in the evening at a time when it was light, not dark (witness McGee).

Further, the Wabash engineer, Long, testifying as to the conditions existing at the time of the collision, said:

"Q. What was the condition of the weather? Was it clear or cloudy?

A. I don't know whether it was clear or cloudy; it was just hazy-like; if you have ever been out on the road in the fall of the year you will run along maybe a half mile and you are in a haze, and maybe the next half mile it is just as clear as crystal; that is the way it was.

Q. Was it clear or hazy at Hulls at that time?

A. It was kind of hazy.

Q. Was it raining?

A. No, it started raining right after the wreck.

Q. I will ask you whether it was cloudy at the time of the collision?

A. Must have been; it was kind of dark."

It will thus be seen that it was light enough for a person to see distinctly if intent upon what he was doing, and dark enough that a person could not see objects at any distance by a mere glance. The evidence was silent upon whether or not the locomotive engineer

Frese, when the train stopped, went over to the fireman's side to look for the approach of a train upon the Wabash tracks from the east, but that is immaterial for the reason that if he had done so he could not have seen the Wabash train because it was a greater distance east along the Wabash track from the crossing than he was north and west along the Burlington track from the crossing. This is deduced from the evidence of the witness McGee, who says the Burlington train was running six or seven miles per hour, and is further established by the photographs.

Of course, Frese having sounded the whistle and started the train toward the crossing, could not at the same time have his train under control and leave his position at the throttle to look for the approach of trains on the Wabash track from the east or fireman's side of the engine.

The evidence of the witness Wade shows positively that the engineer, when at his proper post, had no view whatever of anything on the fireman's side.

The evidence of the witness McGee as to the action of the fireman Savage established convincingly his negligence. McGee states that from the point where the engine stopped to a point a distance of fifty or sixty feet from the crossing he observed the fireman, and that the fireman sat with his head outside the cab window looking through the front window of the cab to the southeast during all of that time. It will be remembered that the direction of the Burlington train approaching the crossing is directly southeast. From the demonstration and evidence given by McGee it is clear that Savage, in his position and looking as he was, could not have seen even in a crystal clearness of the atmosphere, the Wabash train approaching from the east.

Witness McGee testifying:

"Q. Did you notice the fireman on the Burlington engine when he passed you?

A. Yes, sir.

Q. What was he doing?

A. It seemed like he was looking straight ahead.

Q. What was the position of his head with reference to sitting or leaning?

A. Well, he was leaning in the cab something like this (indicating).

Q. What was he looking through as he looked forward?

A. It looked to me like he was looking through the front window.

Q. Was he looking outside of the cab, or looking through the front window in front of the cab?

A. It looked to me like he was looking through the front window.

Q. Did you continue to watch him as he approached the crossing?

A. Yes, sir.

Q. How close had his engine gotten to the Wabash Crossing track when he continued in that position?

A. I judge thirty to thirty-five feet.

Q. From what?

A. The depot.

Q. From what part of the depot?

A. The southwest corner.

Q. That would be this corner (indicating)?

A. Yes, sir.

275 Q. How far was he from the crossing itself, in feet?

A. Oh, I judge about fifty or sixty feet, something like that.

Q. Did you see what he then did?

A. No, sir."

From a distance much greater than sixty feet along the Burlington track northwest of the crossing it would be impossible to see a train approaching the crossing from the east on the Wabash track except as it emerged into view south of the depot; and from a view obtained in this manner the trains would, of course, be too close to avoid a collision.

The fireman Savage, still in the employ of the defendant Chicago, Burlington & Quincy Railroad Company, was present at the trial, but was not placed upon the stand by defendant.

"Mr. Parkinson: We offer in evidence deposition of Mr. Savage, taken under notice given by the plaintiff.

Mr. Roberts: We object because the witness is here.

The Court: Objection sustained."

The evidence established that it was immaterial whether headlights were lighted upon the engines or not for the reason that in the daytime or light they would not cast any rays forward.

Robert B. Caldwell testifying:

"Q. Mr. Caldwell, I neglected to ask you one question when you were on the stand. You answered a question as to whether
276 or not an electric headlight would show. Did you mean in the light or dark?

A. In the dark.

Q. State whether or not in daylight either an electric headlight or an acetylene headlight will project a light 100 feet.

A. Not in daylight.

Q. State do you know what it will do at 5:30 in the month of October on the Missouri River bottom?

A. I think at that time it would show some reflection.

Q. State whether or not you could tell how far it would be, a foot or ten feet or fifteen feet.

A. No, sir; I couldn't tell."

The evidence showed that the customary way by which an engineer positively ascertained that a grade crossing, not controlled by semaphore, was safe, was by bringing his train to a stop, ascertaining from the fireman the condition upon his side, observing ahead upon his own side and keeping his engine under control by remaining at his post of duty.

The evidence also showed that it was customary in approaching a railroad crossing for the fireman to protect the engine and train from his side by observation and warning to the engineer, if necessary.

A jury, the second one which had passed favorably on the case, found for the plaintiff in the sum of twelve thousand dollars (\$12,000.00).

The plaintiff's evidence showed that the engineer was in charge of the engine, and the defendant offered in evidence a statute
277 of Illinois, which reads as follows:

"All trains running on any railroad in this state, when approaching a crossing with another railroad upon the same level, or when approaching a swing or draw bridge, in use as such, shall be brought to a full stop before reaching the same, and within eight hundred (800) feet therefrom, and the engineer or other person in charge of the engine attached to the train shall positively ascertain that the way is clear, and that the train can safely resume its course, before proceeding to pass the bridge or crossing."

At the close of the plaintiff's case counsel for the defendant asked an instruction in the nature of a demurrer to the evidence, which was by the Court refused, and counsel for defendant duly excepted.

Opinion.

I.

There are many errors assigned by counsel for the appellant, but from the view we take of the case it will not be necessary to notice but one of them, and that is the refusal of the trial court to give appellant's demurrer to respondent's evidence.

This action of the Court, in our opinion, was reversible error, for the reason that respondent's own evidence showed that the engine in question was under the control of the engineer who was killed, and under the statute of Illinois, before copied, imposed upon him the imperative duty to positively ascertain that the way was
278 clear before entering upon the crossing. This he did not do; but had he done so, he clearly would not have been killed.

II.

Counsel for respondent attempt to escape the operation of the statute before mentioned by introducing evidence tending to show that there was a custom or usage in force upon the engine in question whereby it became the duty of the fireman thereof to look out for approaching engines on his side of the train and to notify the engineer in case he saw an engine approaching the crossing over which they were to cross.

The trouble with this position is, no such question was presented by the pleading, and independent of that the evidence introduced does not tend to show that the officers in charge of the appellant company had any notice of the existence of said custom. Moreover, in my opinion, the existence of such a custom, if it existed, could not have the effect to abrogate the statute mentioned.

In a somewhat similar case, the Supreme Court of the United States, in discussing this question, used this language:

"His fate gives pause to blame, but we cannot help pointing out that the tragedy of the collision might have been appalling. He brought death to himself and to the conductor of his train. His neglect might have extended the catastrophe to the destruction of passengers in the colliding train. How imperative his duty was is manifest. To excuse its neglect in any way would cast im-
279 measurable liability upon the railroads and, what is of greater concern, remove security from the lives of those who travel upon them; and, therefore, all who are concerned with their operation, however high or low in function, should have a full and anxious sense of responsibility."

Great Northern Ry. Co. v. Wiles, 240 U. S. 444, l. c. 448.

For the reasons stated the judgment of the Circuit Court is reversed and judgment will hereby be rendered for the appellant.

Graves, J., concurs; Elder, J., concurs in result. James T. Blair, J., dissents, because he thinks that case should be remanded.

A. M. WOODSON,
P. J.

280 And thereafter, and on the 12th day of March, 1921, the following further proceedings were had and entered of record in said cause, to-wit:

In the Supreme Court of Missouri, Division No. 1, October Term, 1920.

(No. 21660.)

JOHANNA FRESE, Administratrix of the Estate of Joseph J. Frese,
Deceased, Respondent,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Appellant.

Comes now the said respondent, by attorney, and files her motion for a rehearing herein, as also her motion to transfer this cause to the Court in Banc.

Which said motion for a rehearing and said motion to transfer this cause to the Court in Banc are in the words and figures following, to-wit:

281 Which said motion for rehearing is in words and figures as follows:

In the Supreme Court of the State of Missouri, Division Number One, October Term, 1920.

JOHANNA FRESE, Administratrix of the Estate of Joseph J. Frese,
Dcd., Respondent,

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Appellant.

Motion for Rehearing.

Comes now the respondent in the above entitled cause and moves the Court to grant her a rehearing herein upon the opinion heretofore rendered in this cause on; to-wit: the 5th day of March, 1921, and for grounds of said motion states:

1. That said opinion overlooks the provisions of positive statute; to-wit: the Federal Employers' Liability Act (Act, Apr. 22, 1908 c.

149 Sec. 3, 35 Stat. 66, Sec. 8659 U. S. Comp. Stat. 1916) and particularly Section 3 thereof, wherein it is provided:

"Contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee * * *

in that the opinion holds that the engineer was guilty of negligence and consequently his administratrix cannot recover, thereby also overlooking the fact that the fireman was also guilty of negligence and the provisions of Sec. 2 of the above cited Acted of Congress, upon which this action is based wherein it is provided:

"Every common carrier * * * shall be liable in damages * * * in case of the death of such employee * * * for such * * * death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier * * *

The moderate amount of this verdict indicates clearly that the jury did take into consideration contributory negligence of the deceased under the provisions of plaintiff's instructions 2 and 5 and the judgment should, therefore, be reconsidered and affirmed.

MYTTON & PARKINSON,

Attorneys for Respondent.

[Endorsed:] 21659. Johana Frese, Admx., &c., Respondent, v. Chicago, Burlington & Quincy Railroad Company, Appellant. Respondent's Motion for Rebearing. Filed Mar. 12, 1921. J. D. Allen, Clerk Supreme Court. Mytton & Parkinson, St. Joseph, Mo., Attorneys for Respondent.

282 Which said motion to transfer to Court en banc is in words and figures as follows:

In the Supreme Court of the State of Missouri, Division No. 1,
October Term, 1920.

#21659.

JOHANNA FRESE, Administratrix of the Estate of Joseph Frese,
Dcd., Respondent,

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Appellant.

Motion to Transfer to Court en Banc.

Comes now the Respondent in the above entitled cause and moves the Court to transfer this cause to the Supreme Court en banc as provided in Sec. 4 of the Amendment of 1890 to Art. VI. of the

Constitution of the State of Missouri and for grounds of said motion states:

1. That this cause was decided in Division; to-wit Division Number One on; to-wit: the 5th day of March, 1920 and an opinion filed therein on said date; that one of the Judges of said Division; to-wit: Honorable James T. Blair, dissented from said opinion filed herein.

MYTTON & PARKINSON,
Attorneys for Respondent.

[Endorsed:] No. 21659. Johana Frese, Admx., &c., Respondent, v. Chicago, Burlington & Quincy Railroad Company, Appellant. Respondent's Motion to Transfer to Court en Banc. Mytton & Parkinson, St. Joseph, Mo., Attorneys for Respondent.

283 And thereafter, and on the 9th day of April, 1921, the following further proceedings were had and entered of record in said cause, to-wit:

In the Supreme Court of Missouri, Division No. 1, October Term, 1920.

(No. 21660.)

JOHANNA FRESE, Administratrix of the Estate of Joseph J. Frese,
Deceased, Respondent,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Appellant.

Now at this day, the Court having considered and fully understood the motion of the said respondent for a rehearing herein, and said respondent's motion to transfer this cause to the Court in Banc, doth order that said motion for a rehearing be overruled, and doth further order that said motion to transfer this cause to Court in Banc be sustained, and that said cause be, and the same is hereby, transferred to the Court in Banc.

And thereafter, and on the 8th day of November, 1921, the following further proceedings were had and entered of record in said cause, to-wit:

In the Supreme Court of Missouri, in Banc, October Term, 1921.

(No. 21660.)

JOHANNA FRESE, Administratrix of the Estate of Joseph J. Frese,
Deceased, Respondent,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Appellant.

Come now the said parties, by attorneys, and after argument herein, submit this cause to the Court.

284 And thereafter, and on the 30th day of November, 1921,
the following further proceedings were had and entered of
record in said cause, to-wit:

In the Supreme Court of Missouri, in Banc, October Term, 1921

JOHANNA FRESE, Administratrix of the Estate of Joseph J. Frese,
Deceased, Respondent,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Appellant.

Appeal from the Circuit Court of Buchanan County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Buchanan County rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which it has lost by reason of the said judgment. It is further considered and adjudged by the Court that the said appellant be discharged, and go hence without day, and recover against the said respondent its costs and charges herein expended and have execution therefor. (Opinion filed.)

Which said opinion is in the words and figures following, to-wit:

285 In the Supreme Court of the State of Missouri, Court en Banc, October Term, 1920.

No. 21660.

JOHANNA FRESE, Admr., etc., Respondent,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD Co., Appellant.

Statement.

This suit was instituted in the Circuit Court of Buchanan County by the plaintiff against the defendant to recover damages for the alleged negligence of the latter in killing the former's husband. The trial resulted in verdict and judgment for the plaintiff in the sum of \$12,000 and in proper time and manner the defendant appealed the cause to this Court.

Counsel for both plaintiff and defendant have made a full and fair statement of the case in their respective briefs, but we will adopt that of plaintiff as it probably more clearly emphasizes the points presented for consideration, which is as follows:

This is an action by Johanna Frese, Administratrix of the Estate of Joseph J. Frese, deceased, to recover compensation under the Federal Employers' Liability Act for the benefit of herself, as his widow, and their children, on account of his death on the 30th day of October, 1916, from injuries inflicted on that date at Hulls, 286 Illinois, while he was a locomotive engineer in the employ of the defendant company and operating one of its trains, by reason and on account of the negligence of the defendant company through its fireman, Savage, on account of said train being run into collision with a train operated by the Wabash Railroad Company.

A- the time of his death Joseph J. Frese had his mansion house and principal place of abode in Adams County, Illinois, and Mrs. Frese was appointed administratrix in the court of that county having probate jurisdiction, and instituted this suit in the Circuit Court of Buchanan County, Missouri.

The tracks of the Chicago, Burlington & Quincy Railroad Company at Hulls run from northwest to southeast in a straight line and cross at grade the tracks of the Wabash Railroad Company, which run directly east and west.

North of the Wabash tracks and east of the Burlington tracks a joint depot is located, the southwest corner of which is seventeen feet two inches from the east rail of the Chicago, Burlington & Quincy Railroad Company track. The depot is twenty-two feet four inches in width, and fifty-two feet six inches in length, and is in a position at an angle to both tracks and not parallel with either.

The plaintiff's Exhibits "L" and "J", being plats produced by the plaintiff and defendant, respectively, each very accurately show

the physical situation (but which are too extensive to be set out here).

A transfer track running from the Chicago, Burlington & Quincy Railroad Company track to the Wabash track north of the depot leaves the Burlington track at a switch point three hundred fifty-five feet northwest of the crossing, and with the frog formed by the transfer track and the Burlington track a distance of two hundred

eighty-three feet northwest of the crossing, running into the
287 Wabash track at a switch point distant from the railroad crossing along the Wabash Railroad three hundred fifty-five feet six inches, with the frog point formed by the transfer track and the Wabash track at a point two hundred eighty-one feet six inches east of the crossing along the Wabash railway. The length of this transfer track from frog point to frog point is five hundred forty-two feet six inches, and it bends so that it parallels the north-east side of the depot at a distance of fifteen feet therefrom.

North of this transfer track and in the bend are a number of buildings. Northwest of the depot and between the Burlington track and the transfer track is a coal shed indicated on the map, ten feet high, seven feet four inches wide and fourteen feet long, located fifteen feet from the Burlington track and six feet from the transfer track. The buildings north of the transfer track and the depot and coal shed, mentioned in evidence, obstruct a view from the engine of a train approaching the crossing along the Chicago, Burlington & Quincy Railroad from the northwest of any train which may be coming from the east along the Wabash track approaching the crossing, so that a view may be had only intermittently.

At a point two hundred and forty feet from the crossing northwest along the Burlington tracks a view may be had looking north and east of the depot of a person standing east from the crossing upon the Wabash track one hundred and fifteen feet therefrom, and not at any place closer to the crossing; and from that point east to a point upon the Wabash track two hundred and thirty-seven feet from the crossing and not at a point beyond that to the east.

From a point two hundred and seventy-six feet northwest along the Burlington track from the crossing a view may be had look-

288 ing north and east of the depot of a man standing upon the

Wabash track east from the crossing one hundred and nine feet and not closer, and east from the crossing one hundred and ninety-seven feet and not beyond that point to the east. As you approach the crossing from the northwest along the Burlington track closer than two hundred and forty feet the view of the Wabash track becomes intermittently obstructed by the coal shed and the depot until a train approaching from the east on the Wabash track could only be seen south of the depot and practically on the crossing.

The evidence of the witness Leslie on cross-examination shows that at a point one hundred and ninety-seven feet from the crossing northwest along the track of the Chicago, Burlington & Quincy Railroad you could see a train on the Wabash track if there had been one there, but he says nothing to show at what point upon the Wabash track the train had to be to be seen. His evidence also

showed that if the pilot of the engine was at a point one hundred and ninety-seven feet from the crossing the fireman in the cab would be sixteen to eighteen feet farther to the north and that from that point you could see a train on the Wabash track looking north of the station, but his evidence does not in any way indicate where the train would be on the Wabash track.

On the 30th day of October, 1916, Joseph J. Frese, as locomotive engineer, and Savage, as fireman, in the employ of the Burlington Railroad, were running a mixed train consisting of six or eight freight cars and two passenger coaches in interstate commerce from the northwest, traveling southeast approaching the depot and crossing at Hulls, about 5:30 in the evening. The pilot of the engine was brought to a stop twelve or fifteen feet northwest of the stop post, as it then existed, located at the northeast corner of the section house, a distance of one hundred and ninety-seven feet northwest from the crossing.

289 Giving heed to the evidence of McGee as to where the stop post was then located and also as to where the engine stopped with reference to the road, and the evidence of Leslie as to the length back from the pilot the fireman is when sitting in the engine, this would place the fireman about two hundred and thirty or two hundred and forty feet northwest of the crossing.

The whistle upon the Burlington engine was sounded twice. No sounding of a whistle of the engine on the Wabash track was heard by the witness standing by the Burlington engine.

The evidence of the Wabash engineer, Long, was that at a point about Three hundred feet east of the crossing he stopped his engine and freight train and whistled twice. The probable deduction from the evidence of the two witnesses, and the fact, was that the two engines whistled simultaneously. The Burlington engine then proceeded southeast along the track at a rate of speed of six or seven miles an hour, intending to stop with the train at the depot, which would throw the engine some little distance across the Wabash track to the southeast. The Wabash train proceeded west toward the crossing at a rate of speed estimated by the engineer of eight miles an hour. The pilots of the engines met at the crossing, derailed and turning over the Burlington engine and killing Frese, the locomotive engineer upon the Burlington train. The collision occurred at about 5:30 in the evening at a time when it was light not dark. (Witness McGee.)

Further, the Wabash engineer, Long, testifying as to the conditions existing at the time of the collision, said:

Q. What was the condition of the weather? Was it clear or cloudy?

A. I don't know whether it was clear or cloudy; it was just
290 hazy-like; if you have ever been out on the road in the fall of the year you will run along maybe a half mile and you are in a haze, and maybe the next half mile it is just as clear as crystal; that is the way it was.

Q. Was it clear or hazy at Hulls at that time?

A. It was kind of hazy.

Q. Was it raining?

A. No, it started raining right after the wreck.

Q. I will ask you whether it was cloudy at the time of the collision?

A. Must have been; it was kind of dark.

It will thus be seen that it was light enough for a person to see distinctly if intent upon what he was doing, and dark enough that a person could not see objects at any distance by a mere glance. The evidence was silent upon whether or not the locomotive engineer Frese, when the train stopped, went over to the fireman's side to look for the approach of a train upon the Wabash tracks from the east, but that is immaterial for the reason that if he had done so he could not have seen the Wabash train because it was a greater distance east along the Wabash track from the crossing than he was north and west along the Burlington track from the crossing. This is deduced from the evidence of the witness McGee, who says the Burlington train was running six or seven miles per hour, and is further established by the photographs.

Of course, Frese having sounded the whistle and started the train toward the crossing, could not at the same time have his train under control and leave his position at the throttle to look for the approach of trains on the Wabash track from the east or fireman's side of the engine.

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Q. Did you notice the fireman on the Burlington engine when he passed you?

A. Yes, sir.

Q. What was he doing?

A. It seemed like he was looking straight ahead.

Q. What was the position of his head with reference to sitting or leaning?

A. Well, he was leaning in the cab something like this (indicating).

Q. What was he looking through as he looked forward?

A. It looked to me like he was looking through the front window.

Q. Was he looking outside of the cab, or looking through the front window in front of the cab?

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Q. Did you continue to watch him as he approached the crossing?

A. Yes, sir.

292 Q. How close had his engine gotten to the Wabash crossing track when he continued in that position?

A. I judge thirty to thirty-five feet.

Q. From what?

A. The depot.

Q. From what part of the depot?

A. The southwest corner.

Q. That would be this corner (indicating)?

A. Yes, sir.

Q. How far was he from the crossing itself, in feet?

A. Oh, I judge about fifty or sixty feet, something like that.

Q. Did you see what he then did?

A. No, sir.

From a distance much greater than sixty feet along the Burlington track northwest of the crossing it would be impossible to see a train approaching the crossing from the east on the Wabash track except as it emerged into view south of the depot; and from a view obtained in this manner the trains would, of course, be too close to avoid a collision.

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Mr. Roberts: We object because the witness is here.

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Q. State whether or not in daylight either an electric headlight or an acetylene headlight will project a light 100 feet.

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294 The plaintiff's evidence showed that the engineer was in charge of the engine, and the defendant offered in evidence a statute of Illinois, which reads as follows:

"All trains running on any railroad in this state, when approaching a crossing with another railroad upon the same level, or when approaching a swing or draw bridge, in use as such, shall be brought to a full stop before reaching the same, and within eight hundred (800) feet therefrom, and the engineer or other person in charge of the engine attached to the train shall positively ascertain that the way is clear and that the train can safely resume its course before proceeding to pass the bridge or crossing."

At the close of the plaintiff's case counsel for the defendant asked an instruction in the nature of a demurrer to the evidence, which was by the Court refused and counsel for defendant duly excepted.

Opinion.

I.

There are many errors assigned by counsel for the appellant, but from the view we take of the case, it will not be necessary to notice but one of them, and that is the refusal of the trial court to give appellant's demurrer to respondents' evidence.

This action of the Court in our opinion was reversible error, for the reason that respondent's own evidence showed that the
295 engine in question was under the control of the engineer who was killed, and under the statute of Illinois, before copied, imposed upon him the imperative duty to positively ascertain that

the way was clear before entering upon the crossing. This he did not do; but had he done so, he clearly would not have been killed.

II.

Counsel for respondent attempt to escape the operation of the statute before mentioned by introducing evidence tending to show that there was a custom or usage in force upon the engine in question whereby it became the duty of the fireman thereof to look out for approaching engines on his side of the train and to notify the engineer in case he saw an engine approaching the crossing over which they were to cross.

The trouble with this position is, no such question was presented by the pleading, and independent of that the evidence introduced does not tend to show that the officers in charge of the appellant company had any notice of the existence of said custom. Moreover in my opinion the existence of such custom, if it existed, could not have the effect to abrogate the statute mentioned.

In a somewhat similar case, the Supreme Court of the United States in discussing this question used this language:

"His fate gives pause to blame, but we cannot help pointing out that the tragedy of the collision might have been appalling. He brought death to himself and to the conductor of his train.
296 His neglect might have extended the catastrophe to the destruction of passengers in the colliding train. How imperative his duty was is manifest. To excuse its neglect in any way would cast immeasurable liability upon the railroads and, what is of greater concern, remove security from the lives of those who travel upon them; and therefore all who are concerned with their operation, however high or low in function, should have a full and an anxious sense of responsibility."

Great Northern Ry. v. Wiles, 240 U. S. 444, l. c. 448.

For the reasons stated the judgment of the Circuit Court is reversed and judgment will hereby be rendered for the appellant.

A. M. WOODSON,
P. J.

Graves, Higbee and David E. Blair, J. J. concur. Elder, J. concurs in the result; James T. Blair, C. J. and Walker, J. concur in reversing the judgment, but think the cause should be remanded.

297 STATE OF MISSOURI, *set*:

I, J. D. Allen, Clerk of the Supreme Court of Missouri certify that the above and foregoing is a full, true and complete transcript of the record and proceedings in the case of Johanna Frese, Admrx., etc. resp., vs. C. B. & Q. Ry. Co., app., as fully as the same appear of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at office in the City of Jefferson, State afore-said, this 4th day of February, 1922.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of the Supreme Court of the State of Missouri.

298 In the Supreme Court of the United States, October Term,
A. D. 1921.

JOHANNA FRESE, Administratrix of the Estate of Joseph J. Frese, Deceased, Petitioner.

VS.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Respondent.

Re petition for Writ of Certiorari to the Supreme Court of the State of Missouri.

It is hereby stipulated by and between, the Petitioner, Johanna Frese, Administratrix of the Estate of Joseph J. Frese, deceased, and the Chicago, Burlington & Quincy Railroad Company, Respondent, that in lieu of filing copies of the supplemental abstract of the record containing solely exhibits consisting of

Plaintiff's Exhibit J—a photograph of the crossing of the Wabash and Burlington tracks, looking from northwest to southeast.

Plaintiff's Exhibit K—a photograph showing the same view from a further point northwest.

Defendant's Exhibit 1—a photograph of a Burlington locomotive engine.

Defendant's Exhibit 2—a photograph of the crossing from a point northwest of the depot.

Defendant's Exhibit 3—a photograph of the crossing from a point further northwest of the depot.

Defendant's Exhibit 4—a photograph of the crossing from a point still further northwest of the depot.

Defendant's Exhibit 5—a photograph of the depot from a point east thereof along the Wabash track.

Defendant's Exhibit 21—a photograph of the Hulls depot.

Defendants' Exhibit 22—the roadway, transfer track and Burlington track at Hulls.

299 Defendant's Exhibit 23—a photograph of the elevator and depot.

Plaintiff's Exhibit I—a photographic copy of the plat showing grounds, tracks and switches at Hulls.

That the petitioner may file with her petition the original exhibits and photographic copies of the plats, being Plaintiff's Exhibits I and H or L.

JOHN G. PARKINSON,
Attorney for Petitioner.
M. G. ROBERTS,
E. M. SPENCER,
H. J. NELSON,

Counsel for Chicago, Burlington & Quincy Railroad Company.

300 [Endorsed]: 769—28724.—Johanna Frese, Administratrix of the estate of Joseph J. Frese, deceased, Petitioner, vs. Chicago, Burlington & Quincy Railroad Company, Respondent. Re Petition for Writ of Certiorari to the Supreme Court of the State of Missouri. John G. Parkinson, Attorney for Petitioner.

301 [Endorsed:] File No. 28724. Supreme Court U. S., October Term, 1921. Term No. 769. Johanna Frese, Adm'x &c., Petitioner, vs. C. B. & Q. Ry. Co. Stipulation as to filing exhibits. Filed Feb. 20, 1922.

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Missouri, Greeting:

Being informed that there is now pending before you a suit in which Chicago, Burlington & Quincy Railroad Company is appellant, and Johanna Frese, Administratrix of the Estate of Joseph J. Frese, deceased, is respondent, which suit was removed into the said Supreme Court by virtue of an appeal from the Circuit Court of Buchanan County, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,

Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 28,724. Supreme Court of the United States, October Term, 1921. No. 769. Johanna Frese, Administratrix, etc., vs. Chicago, Burlington & Quincy Railroad Company. Writ of Certiorari.

In the Supreme Court of the State of Missouri.

JOHANNA FRESE, Administratrix of the Estate of Joseph J. Frese,
Deceased, Respondent,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Appellant.

I, Jacob D. Allen, Clerk of the Supreme Court of the State of Missouri, do hereby certify that the transcript of the record of the proceedings in this Court in the above entitled cause, heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this court.

In pursuance of the command of the Writ of Certiorari issued out of the Supreme Court of the United States and directed to the Honorable Judges of the Supreme Court of the State of Missouri, dated the 6th day of April, in the year of our Lord, 1922, I now hereby certify that on the 13th day of April, 1922, there was filed in my office a stipulation in the above entitled cause, in the following words, to wit:

(Endorsements omitted.)

In the Supreme Court of the State of Missouri.

JOHANNA FRESE, Administratrix of the Estate of Joseph J. Frese,
Deceased, Respondent,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Appellant.

Stipulation.

It is hereby stipulated between the Appellant, Chicago, Burlington & Quincy Railroad Company, and Respondent, Johanna Frese, Administratrix of the Estate of Joseph J. Frese, deceased, that the transcript of record as certified by Clerk of Supreme Court of Missouri, and filed in the office of the Clerk of the Supreme Court of the United States with the petition for Writ of Certiorari be taken as the return to said Writ, dated the 6th day of April, A. D. 1922.

Dated this 11th day of April, 1922.

M. G. ROBERTS,

E. M. SPENCER,

H. J. NELSON,

Attorneys for Appellant.

JOHN G. PARKINSON,

Attorney for Respondent.

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof.

Witness my official signature and the seal of the said Supreme Court of the State of Missouri, at the City of Jefferson City, in the State of Missouri, this 13th day of April, 1922.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,

Clerk of the Supreme Court of the State of Missouri.

Cost of certified transcript of record, (\$136.50) filed in Supreme Court of the United States in above-entitled cause, was paid by respondent, Johanna Frese Administratrix, etc., on the 3rd day of February, 1922.

[Endorsed:] File No. 28,724. Johanna Frese, Administratrix, etc., Respondent, vs. Chicago, Burlington & Quincy Railroad Company, Appellant. Return to Writ of Certiorari.

[Endorsed:] File No. 28,724. Supreme Court U. S., October Term, 1921. Term No. 769. Johanna Frese, Admx., etc., Petitioner, vs. C. B. & Q. R. R. Co., Writ of certiorari and return. Filed April 17, 1922.

Office Supreme Court, U.

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WM. R. STANSBURY

CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1923.

JOHANNA FRESE, Administratrix of
the Estate of JOSEPH J. FRESE,
Deceased,

Petitioner,

vs.

No. 27.

CHICAGO, BURLINGTON & QUINCY
RAILROAD COMPANY,

Respondent.

On Writ of Certiorari to the Supreme Court of the
State of Missouri.

STATEMENT AND BRIEF OF RESPONDENT.

BRUCE SCOTT,
H. J. NELSON,
E. M. SPENCER,
M. G. ROBERTS,

Attorneys for Respondent.

St Louis, Missouri,
September 21, 1923.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1923.

JOHANNA FRESE, Administratrix of the Estate of JOSEPH J. FRESE, Deceased,	Petitioner,	} No. 27.
vs.		
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,	Respondent.	

On Writ of Certiorari to the Supreme Court of the
State of Missouri.

STATEMENT AND BRIEF OF RESPONDENT.

STATEMENT OF THE CASE.

Respondent believes that a more complete statement of the facts should be presented herein than that contained in the brief of petitioner in order that the Court may properly understand the decision of the Supreme Court of Missouri.

In her petition filed in the Circuit Court of Buchanan County, Missouri, Johanna Frese, administratrix of the estate of Joseph J. Frese, deceased, petitioner herein, alleged that on October 30, 1916, at a grade crossing of the Burlington and Wabash railroads at Hulls, Illinois, a collision occurred between the mixed interstate train of the former and a freight train of the latter, resulting in the death of Joseph J. Frese, the engineer on the Burlington train. The petition alleged several distinct and separate allegations of negligence, but the one charge of negligence on which the plaintiff (petitioner herein) submitted her case to the jury was that the fireman on Frese's engine failed to keep a lookout for approaching trains on the Wabash track and that by reason thereof Frese caused the Burlington train to collide with the Wabash train.

With the exception of certified copies of the petition filed by the same plaintiff against the Wabash Railroad Company, alleging that Frese was killed by reason of the negligence of the employes of **that** company, and an Illinois statute governing and regulating the duties of locomotive engineers while approaching grade crossings, the defendant (respondent herein) at the trial stood upon the plaintiff's proof.

The defendant's leading contention before the Supreme Court of Missouri was that its instruction in the nature of a demurrer to the evidence should have

been given for the following reasons, to wit: (a) That no substantial evidence was introduced tending to establish that the negligence of the fireman on Frese's engine caused the collision; (b) that the negligence of Frese in failing to comply with the statute of the State of Illinois requiring **him** to positively ascertain that the way was clear before proceeding to pass over the crossing was the sole proximate cause of his own death without any concurring negligence on the part of his fireman; (c) that a foreign administrator could not sue in courts of Missouri without statutory authority therefor.

The plaintiff's theory to establish liability against the defendant was that the collision was caused by the negligence of the fireman, Mr. Savage, on the Burlington train. It was claimed (a) that Mr. Frese, by reason of his position on the right-hand side of his engine, did not see the approach of the Wabash train; (b) that the fireman, situated on the left-hand side, negligently failed to keep a lookout for the Wabash train; (c) that by reason thereof he did not see the Wabash train; (d) that he did not notify Frese of the approach of the Wabash train, and (e) that by reason thereof Frese caused his train to collide at the grade crossing. But this record is entirely silent as to whether Frese heard the whistling of the Wabash train and therefore had knowledge of its approach. This record is entirely silent as to whether Savage

either saw or heard the Wabash train. This record is entirely silent as to what communication or conversation took place between Frese and Savage prior to the collision.

The petitioner's evidence to establish the alleged negligence of the fireman was confined solely to the testimony of two eye-witnesses of the accident: M. A. Long, the engineer on the Wabash train (Pr., Rec., pp. 56-70) and Boland McGee, a resident of Hulls (Pr., Rec., pp. 70-81). A summary of the testimony of the two eye-witnesses is here given: Boland McGee was standing on the ground near the road or street crossing and between the Burlington track and the transfer track. The south edge of this road crossing is 249 feet from the intersection of the two tracks. The Burlington train stopped at the road crossing, where it whistled for the Wabash crossing. The train then proceeded and the engine passed McGee while he was standing near the street crossing. At that time McGee saw the fireman in the engine. It seemed to him like the fireman was looking straight ahead. It looked to McGee like he was looking through the front window. After the engine passed, the fireman had his back to McGee. The train was moving to the southeast. When McGee saw the fireman he was looking to the southeast. The plaintiff's proof discloses that from the said road crossing to a point 127 feet north of the center

of the crossing the fireman on the Burlington engine could see a train on the Wabash tracks. McGee does not pretend to testify or to state what Savage saw after the engine passed him. He could not possibly have known, as he was on the ground and the fireman was eleven feet above the ground, with his back to McGee and a tender and train of cars behind him. Neither did McGee know what Savage heard or what he said to the engineer. McGee did not say that after passing him near the road crossing the fireman did not cast his eyes east as well as west of the depot. With the train running to the southeast he could at one and the same glance observe the Wabash track, both west and east of the depot to a point 127 feet north of the Wabash crossing.

In short, the plaintiff's proof establishes that Savage was faithfully performing the duty of looking ahead through the front window of the cab, where, under well-known physical laws, his range of vision extended from the west side of the depot to the west side of the elevator. Had he riveted his eyes on the space between the elevator and depot without looking also at the track in front of him, Savage would have failed in his duty, but by placing himself at the front window, as McGee said he did, he had a view of both points. McGee's testimony simply shows a fulfillment of duty and not a breach of it. His statement

exonerates Savage of the charge in the petition that he failed to keep a lookout.

The testimony of the other eye-witness, M. L. Long, the engineer of the Wabash train, throws no light whatever on what Savage saw, heard or said to the engineer as he approached the crossing. Long testified that he was at his post of duty at the right-hand side of the engine. He brought his train to a full stop and sounded two blasts of the whistle. He did not hear the Burlington train whistle. He did not see the Burlington train, although he said that he looked in the direction of the Burlington track to ascertain whether or not there was a train on it. He saw neither the headlight nor smoke from the Burlington train. Asked why he did not see this Burlington train, he said he laid it to the weather, it was hazy in spots and other places were clear. The headlight on his engine was lit. When within a few feet of the crossing he saw the Burlington train. It was going pretty fast, "looked to me like it was going awful fast. He had a short train."

The foregoing, respondent submits, is a fair summary of the evidence introduced to establish that the negligence of the fireman was the proximate cause of the collision.

BRIEF AND ARGUMENT.

I.

Petitioner would have this Court believe that the Supreme Court of Missouri held that Frese's negligence relieved the carrier of liability even though the fireman was also negligent. No such contention was ever made in this case at any time, and the Supreme Court of Missouri did not so hold. The decision is not susceptible of such interpretation. The Supreme Court of Missouri in numerous cases has recognized that contributory negligence is not a bar to recovery under the Federal Employers' Liability Act; for the mandate of section 3 is plain and unequivocal and was well understood by the Court. It is to be regretted that a transcript of the oral argument before the Missouri court is not a part of the record in this case. We readily recognize and agree with petitioner that Frese's negligence, no matter how gross, will not bar a recovery in this case if the fireman's negligence also contributed as a proximate cause to the former's death. Does this record show that the Supreme Court of Missouri held to the contrary?

In her brief before this Court petitioner says (page 11):

“As the case was submitted to the jury authorizing a verdict in plaintiff's favor only upon the

finding by the jury that the fireman, Savage, was guilty of negligence, causing the death of Joseph J. Frese, and as the Supreme Court of Missouri would have no occasion to determine the question of whether or not Joseph J. Frese, the engineer, was guilty of contributory negligence unless it first concluded that negligence sufficient to sustain a verdict was established by reason of the acts of the fireman, Savage, we *assume* that the position of the plaintiff, petitioner herein, asserted in the Supreme Court of Missouri that the fireman, Savage, was negligent, was sustained."

Petitioner's "assumption" is not sustained by the record. The Supreme Court of Missouri had occasion to determine whether Frese was guilty of negligence—not of contributory negligence—for the reason that the defendant, in its brief, raised the point that the record conclusively demonstrated that Frese came to his death by reason of his own neglect to observe the statute and not by reason of any negligence of the fireman. It was, therefore, necessary for the Court to determine whether the record sustained the contention made by the appellant. It so held and reversed the case without considering the additional reasons presented.

Under the Missouri practice, an instruction in the nature of a demurrer to the evidence performs the office of a motion for directed verdict. The Supreme

Court of Missouri held that this instruction should have been given for *one* of the reasons urged by the defendant before the trial and the appellate courts, viz., that the plaintiff's evidence (defendant having stood on that) conclusively established that Frese's death was caused by his own negligent failure to comply with the statute of Illinois without any concurring negligence on the part of the fireman (see defendant's answer, Pr. Rec., pp. 8, 9). Both parties assumed at the trial and in the briefs that Frese's negligence would not bar a recovery if the fireman's negligence also contributed directly to the former's death. On the contrary, it was the defendant's contention at the trial and before the Supreme Court that Frese's death was caused by his negligence *alone*, and that no act of commission or omission by the fireman contributed therewith to cause the collision. In this contention the defendant was sustained by the Supreme Court. Judge Woodson held that respondent's own evidence established that Frese caused his own death by failing to positively ascertain that the way was clear and that a custom or usage of placing that duty on the fireman did not operate to nullify or set aside the statute.

The obligation placed upon the engineer under the Illinois law was personal to him and nondelegable. Had he survived the collision, the engineer—not the fireman—would have been the only person liable un-

der the penal provisions of the statute. Having failed to positively ascertain that the crossing was clear, his own flagrant disregard of the statutory duty placed upon him was the prime and proximate cause of the collision. The obligation so placed upon him by the Legislature cannot and should not by the courts be shifted to another. The fireman is at all times subject to the orders and commands of the engineer. In the absence of evidence that he disobeyed the instructions of his superior, the law will place the blame for the accident on him whose duty it was to "positively ascertain." The facts of record show conclusively that he failed so to do.

Petitioner in her brief states that the opinion of the Supreme Court of Missouri herein is contrary to the decision of the Court in *St. Louis National Live Stock Yards Co. v. Godfrey*, 101 Ill. App. 40. The decision of the Court in that case is not authoritative, determinative or in any way persuasive in this case, for each and all of the following reasons:

First. In the *Godfrey* case, the accident occurred in a switch yard, and the Court held that the statute requiring an engineer to positively ascertain that the way was clear did not apply. The comment of the Court as to the statute was purely *obiter dicta*.

Second. The decision was by the Appellate Court of the Fourth District of Illinois. There are four of these appellate court districts in Illinois, each one

made up of three trial judges. It is an intermediate appellate court, and section 17 of the statute creating it (R. S. 1915-1916, Hurd, Chap. 37, p. 776) provides that all opinions of said appellate district courts "shall not be of binding authority in any cause or proceeding other than in that in which they may be filed."

Third. Later, the Godfrey case went to the Supreme Court of Illinois (St. Louis National Live Stock Yards Co. v. Godfrey, 198 Ill. 228, 65 N. E. 90). The Supreme Court of Illinois did not directly or by inference approve the *obiter dicta* in the opinion of the Appellate Court. In fact, the opinion of the Appellate District Court was totally divested of any authority, as will be seen by the following language of the Supreme Court of Illinois on page 292:

"The point made is that the plaintiff, who was in charge of the engine, did not 'positively ascertain' that the way was clear and that such violation of the statute was negligence per se. We are of the opinion that the statute does not apply to switch yards like the one in question, consisting of an intricate system of tracks running in varying directions, some crossing each other, all used for switching purposes and belonging to the same railroad company."

II.

The decision of the Supreme Court of Missouri holding that the defendant's instruction in the nature of a demurrer to the evidence should have been given, constituted a proper interpretation of the Federal Employers' Liability Act, and each section thereof, for the further reason that there was no substantial evidence introduced tending to show that the negligence of the fireman caused the collision.

Plaintiff's evidence does establish that the fireman was at his post of duty, keeping a lookout through the front window of the cab, but nowhere in the record is there a semblance of testimony that he failed to exercise ordinary care. For all that the record discloses, he might have heard the whistle of the approaching Wabash train, or have seen its headlight or the engine itself. What communication or conversation took place between him and the engineer is not disclosed in this record. The engineer might himself have been fully cognizant of the Wabash train's approach, either by notice from his fireman or by sound of the Wabash whistle. In that event, the alleged negligence of Savage could not have been the proximate cause. Frese might—as he had the undoubted right—have assumed that his train—being a superior train—had the right of precedence over the crossing. The record does not disclose which “ac-

cepted" the crossing first; that is, which train whistled first for the crossing. This may have influenced the engineer of the passenger train. To say that the catastrophe was caused by the failure of the Burlington fireman to notify the engineer, under the facts of this record, is to indulge in pure surmise and conjecture. So far as the evidence in this record discloses, the collision may have been caused by a variety of causes consistent with a complete fulfillment of duty on the part of the fireman.

No principle is better established than that if the evidence shows the collision may have been produced by two or more causes, for one of which the defendant is liable, it is not for the jury to guess between these different causes and find that the alleged negligence of the employer was the real cause when there is no satisfactory foundation in the testimony for that conclusion. The plaintiff charges that it was caused by the negligence of the fireman, while the record is entirely silent as to what Savage saw, heard or said when approaching the crossing. On the other hand, this record reeks with negligence bordering upon recklessness on the part of the Wabash engineer. Although he had ears, he admitted that he heard not the Burlington engine whistle for the crossing. Although he looked at the Burlington track, he saw not the approaching train in plain sight. Nothing speculative about that. No surmise or conjecture or

inference built upon inference. He swore that he looked and listened for the Burlington train, but neither saw nor heard it. There is definite, tangible testimony from his own lips, conclusively establishing his negligence. But in the absence of proof, may the jury assume that the Burlington fireman did not either see or hear and did not notify his engineer?

The plaintiff's evidence is entirely consistent with the theory that the fireman did his duty. This Court has never ruled that from proof of a collision the jury may infer or presume that it was due to negligence and not to an accident, and, further, that it was caused by the negligence of a particular one of the two train crews.

The sole circumstance relied upon to show that Savage did not keep a lookout is McGee's testimony to the effect that he was looking ahead through the front window of the cab and not, as plaintiff contends he should have done, through the side window. It is argued, therefore, that he did not see the Wabash train. There is no evidence in the record that a person looking ahead through the front window of the cab could not see down the transfer track west of the depot. To properly perform his duty, he had to look along the Burlington track as well as to the side in front of him. Looking, therefore, through the front window was the proper course, especially as the train was moving to the southeast. In that way the

line of vision was narrow enough to enable him to see on both sides of the depot for an approaching train. To have gazed through the side window would have enabled him to see the town to the northeast of him, but not the Wabash track to the southeast. The very photographs which the plaintiff introduced show conclusively that the radius of sight extended from the elevator on the left of the transfer track to the crossing itself west of the depot. That which an eye can see through the narrow lens of a camera may also be seen by gazing through the window of a cab of a steam locomotive.

To sustain the charge of negligence that Savage did not keep a lookout for the Wabash train plaintiff relies solely on McGee's statement that as Savage passed him at the road crossing he was looking ahead through the front window and not the side window. From this circumstance, plaintiff would have the Court to infer that Savage could and did not see or hear the Wabash train. Such a slight circumstance does not establish that the fireman did not know of the approach of the Wabash train for many reasons:

First. It excludes and contravenes the physical fact that a person traveling to the southeast and looking straight ahead has a wide range of vision to the left. The plat marked "Plaintiff's Exhibit I" is reduced to scale—one inch representing ten feet. The distance from the elevator east of the transfer track

to the Burlington track, sixty feet south of the grade crossing, is only 110 feet. From that point north the radius is gradually smaller so that at the north end of the depot the distance from the main line to the transfer is only fifty-five feet. Under these circumstances the physical facts, therefore, show that a view along the transfer track was within his range of vision.

Second. The inference which the plaintiff draws from McGee's testimony presupposes that as Savage looked ahead that he did intermittently cast glances to the east between the depot and the elevator.

Third. The photographs introduced in evidence in this case (Plaintiff's Exhibits J, K; Defendant's Exhibits 2, 3, 4, 21, 22) conclusively establish that as the fireman advanced the space between the depot and the elevator, as well as the space in front of the depot, was within his range of vision. These photographs show that he could see both points without turning his head.

Fourth. Common experience teaches us that a person looking ahead along a highway of a railroad will necessarily see objects as large as steam engines for at least a distance of 120 feet to the left.

Fifth. All that McGee testified to was entirely consistent with the theory that Savage heard the Wabash train approaching. In other words, it did not disprove the theory that he gained information of

the train by listening for its crossing whistle. If he did and communicated the information to the engineer (as to which there is no testimony pro or con in the record, and the burden of establishing the "con" was on the plaintiff) it was entirely immaterial whether he looked or not.

Petitioner must concede that there is no direct evidence in this record tending to show that the fireman failed to notify the engineer of the approach of the Wabash train. What circumstantial evidence, therefore, is there that overcomes the presumption of due care and establishes his negligence? The fact of the collision is no evidence of negligence. Long's testimony—the Wabash engineer—in nowise discloses negligence on the part of Savage. We are relegated to McGee's evidence, the only other eyewitness. For all that McGee knew or testified to Savage may either have seen or heard the Wabash train and notified the engineer thereof. McGee says Savage was looking to the southeast when he passed him, then his back was to him (McGee). What Savage saw or heard after that McGee could not know. There is, therefore, nothing in the facts and circumstances adduced inconsistent with due care on the part of the fireman. Frese himself may have known of the train's approach. He may have heard the whistle, and, with that knowledge, may have erred in his judgment. He may have miscalculated his speed or the

distance. His brakes may have failed to work. He may have assumed that he had the right of way either because his was a superior train or because he "accepted" the crossing first. No one knows what was in Frese's mind, and unless the proof first establishes that Frese was ignorant of the approach of the Wabash train, the plaintiff does not get to first base in convicting Savage of negligence. For if Frese knew the Wabash train was approaching, Savage's alleged failure to keep a lookout would and could not be the proximate cause of the collision. But plaintiff says Frese could not know because he could not see. Knowledge of a train's approach is not acquired alone by eyesight. A freight train in a quiet village at eventide may be heard. Besides it is undisputed that the Wabash engineer whistled for the crossing. We cannot, therefore, assume, without evidence, that Frese had no knowledge.

Petitioner makes her case by building inference upon inference. She assumes, without evidence, that Savage did not see the train. She assumes, without evidence, that he did not hear the Wabash train. She assumes, without evidence, that he gave no communication to Frese, and she assumes, without evidence, that Frese also did not hear, and, therefore, did not know of the other train's approach.

III.

At the trial of this cause the defendant introduced no evidence, but stood on the plaintiff's proof, believing that it conclusively disclosed that Frese's death was due solely to his own negligence in failing to observe the Illinois statute without any concurring negligence on the part of the fireman contributing thereto. In her brief before this Court (page 16) petitioner calls the Court's attention to the fact that a failure of a party to call witnesses in its employe is a strong circumstance against such party. The foregoing rule does not, however, apply in a case of this kind for the following reasons:

(a) To the rule that an unfavorable presumption exists against a party who fails to introduce a witness a well-recognized exception exists. When the defendant calls no witness, but submits his case upon the plaintiff's proof, on the theory that the plaintiff has not proven his case, no unfavorable inference arises from his failure to call witnesses having special knowledge. There are sound reasons for the enforcement of this rule, for the plaintiff should not be permitted to prove her case by making allegations in the petition and asking the jury to consider them

proof because, if they were not true, the defendant had the means of showing it.

Poirier v. Terceiro, 224 Mass. 435, 113 N. E. 204;

Tully v. Fitchburg R. Co., 134 Mass. 499, l. c. 502;

Eldridge v. Terry etc. Co., 145 App. Div. 560, 129 N. Y. S. 865.

In Stimpson v. Hunter, 234 Mass. 61, 125 N. E. 155, the Court said:

“The failure of the defendant and of his son to testify, although present in court, was not equivalent to affirmative proof of facts necessary to maintain the action. The defendant was not bound to offer any evidence unless and until evidence was offered by the plaintiff warranting the submission of the case to the jury.”

In Davis v. Newsum Auto Tire Co., 141 Tenn. 527, 213 S. W. 914, the Court said:

“Counsel for plaintiff insists that the duty devolved upon defendant to introduce proof which would rebut the unfavorable inference which might be based on the proven ownership of the car. This rule applies only when the plaintiff's proof and the legal deduction therefrom make a prima facie case against defendant.”

In action for alienation of husband's affection, unless plaintiff makes out *prima facie* case, defendant is not required to introduce any proof and therefore no inference can be drawn because defendant is not sworn.

Loper v. Askin, 164 N. Y. S. 1036, 178 App. Div. 163.

In Cooper v. Upton, 60 W. Va. 648, 64 S. E. 523, the Court held that there was no presumption against a defendant for failure to call witnesses, or any particular witness, when the plaintiff, carrying the burden of proof, has not made a *prima facie* case. Such a presumption cannot be used to release the plaintiff from the burden of proof in his case.

In St. Louis & San Francisco R. Co. v. Finley, 122 Tenn. 127, 118 S. W. 692, the Court said that where the plaintiff in an action for personal injury fails to make out a case, it is not incumbent upon the defendant to produce any witness and hence no presumption of fact arises from failure of defendant to call certain witnesses of the accident.

Diel v. Missouri P. R. Co., 37 Mo. App. 454, l. c. 459, wherein the same general rule was recognized.

(b) Where the testimony of the witness not called is clearly accessible to both parties, no unfavorable inference may be drawn. In this case it appears that the witness Savage was present at the trial. The

plaintiff had taken his deposition. Although petitioner's attorney does not agree with us, we think it evident from counsel's opening statement that he intended to put Mr. Savage, the fireman, on the stand. Defendant had the right to assume that plaintiff would prove her case, as promised in the opening statement. Under such circumstances, certainly no unfavorable inference against the defendant can be drawn.

Farmers Bank of Concordia v. Worthington,
145 Mo. 91, l. c. 103;
Kerstner v. Korweg, 130 Mo. 196, l. c. 201;
Coosa Portland Cement Co. v. Crankfield, 202
Ala. 369, 80 Sou. 451;
McGinnis v. McGinnis, 211 Ill. App. 240;
Crane v. Kansas C. S. R. Co., 199 Mo. App.
448, l. c. 451, wherein the Court held that if
a particular witness was equally within the
control of both parties, and was not called,
no foundation is laid for such a presumption.

Respectfully submitted,

BRUCE SCOTT,
H. J. NELSON,
E. M. SPENCER,
M. G. ROBERTS,

Attorneys for Respondent.

St. Louis, Missouri,
September 21, 1923.

Office Supreme Court

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WM. R. STANB

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1923

No. 27

JOHANNA FRESE, ADMINISTRATRIX OF THE ESTATE
OF JOSEPH J. FRESE, DECEASED, PETITIONER,
vs.
CHICAGO, BURLINGTON & QUINCY RAILROAD
COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
THE STATE OF MISSOURI.

BRIEF OF RESPONDENT IN SUPREME COURT OF
MISSOURI AND PETITIONER FOR CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MISSOURI.

JOHN G. PARKINSON,
Attorney for Johanna Frese, Administratrix.

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BRIEF OF RESPONDENT IN SUPREME COURT OF
MISSOURI AND PETITIONER FOR CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MISSOURI.

I. STATEMENT OF THE CASE.

Johanna Frese, administratrix of the estate of Joseph J. Frese, deceased, recovered a judgment against the Chicago, Burlington & Quincy Railroad Company in the Circuit Court of Buchanan County, Missouri, in the sum of twelve thousand dollars (\$12,000.00), for the benefit of herself and the children of her husband, Joseph J. Frese, for the negligent killing of Joseph J. Frese, on account of the negligence of a fireman, one John William Savage.

The case was submitted to the jury upon instructions permitting the jury to determine whether or not Joseph J. Frese was guilty of negligence and authorizing a recovery (a) of full damages in the event that Joseph J. Frese was himself free from negligence contributing to his death, (b) of diminished or proportional damages in the event Joseph J. Frese was guilty of negligence contributing to his death.

An appeal was prosecuted by the Chicago, Burlington & Quincy Railroad Company from the judgment of the Circuit Court of Buchanan County, Missouri, to the Supreme Court of the State of Missouri, and an opinion was rendered by Division Number One of said court, reversing the case outright. Upon motion of Johanna Frese, administratrix, respondent in the Supreme Court of the State of Missouri, based upon a right to transfer by reason of the dissent of a judge of the Divisional Court, the case was transferred to court en banc, and the Supreme Court of the State of Missouri en banc rendered as its opinion the identical opinion theretofore given by the Divisional Court.

The opinion of the Court adopts as a full and fair statement of the facts of the case the statement made by the plaintiff, respondent in the Supreme Court of the State of Missouri, in her brief.

The opinion of the Missouri Supreme Court en banc, which includes the facts in the case, is as follows:

**IN THE SUPREME COURT OF THE STATE OF MISSOURI,
COURT EN BANC, OCTOBER TERM, 1920.**

Johanna Frese, Administratrix, etc., Respondent,

vs.

No. 21660.

Chicago, Burlington & Quincy Railroad Co., Appellant.

STATEMENT.

This suit was instituted in the Circuit Court of Buchanan County by the plaintiff against the defendant to recover damages for the alleged negligence of the latter in killing the former's husband. The trial resulted in verdict and judgment for the plaintiff in the sum of \$12,000, and in proper time and manner the defendant appealed the cause to this Court.

Counsel for both plaintiff and defendant have made a full and fair statement of the case in their respective briefs, but we will adopt that of plaintiff, as it probably more clearly emphasizes the points presented for consideration, which is as follows:

This is an action by Johanna Frese, administratrix of the estate of Joseph J. Frese, deceased, to recover compensation under the Federal Employers' Liability Act for the benefit of herself, as his widow, and their children, on account of his death on the 30th day of October, 1916, from injuries inflicted on that date at Hulls, Illinois, while he was a locomotive engineer in the employ of the defendant company and operating one of its trains, by reason and on account of the negligence of the

defendant company through its fireman, Savage, on account of said train being run into collision with a train operated by the Wabash Railroad Company.

At the time of his death Joseph J. Frese had his mansion house and principal place of abode in Adams County, Illinois, and Mrs. Frese was appointed administratrix in the court of that county having probate jurisdiction, and instituted this suit in the Circuit Court of Buchanan County, Missouri.

The tracks of the Chicago, Burlington & Quincy Railroad Company at Hulls run from northwest to southeast in a straight line and cross at grade the tracks of the Wabash Railroad Company, which run directly east and west.

North of the Wabash tracks and east of the Burlington tracks a joint depot is located, the southwest corner of which is seventeen feet two inches from the east rail of the Chicago, Burlington & Quincy Railroad Company track. The depot is twenty-two feet four inches in width, and fifty-two feet six inches in length, and is in a position at an angle to both tracks and not parallel with either.

The plaintiff's Exhibits "L" and "J," being plats produced by the plaintiff and defendant, respectively, each very accurately show the physical situation (but which are two extensive to be set out here).

A transfer track running from the Chicago, Burlington & Quincy Railroad Company track to the Wabash track north of the depot leaves the Burlington track at a switch point three hundred fifty-five feet northwest of the crossing, and with the frog formed by the transfer track and the Burlington track a distance of two hundred eighty-three feet northwest of the crossing, running into the Wabash track at a switch point distant from the railroad crossing along the Wabash Railroad three hundred fifty-five feet six inches, with the frog point formed by the transfer track and the Wabash track at a point two hundred eighty-one feet six inches east of the crossing along the Wabash Railway. The length of this transfer track from frog point to frog point is five hundred forty-two feet six inches, and it bends so that it parallels the northeast side of the depot at a distance of fifteen feet therefrom.

North of this transfer track and in the bend are a number of buildings. Northwest of the depot and between the Burlington track and the transfer track is a coal shed indicated on the map, ten feet high, seven feet four inches wide and fourteen feet long, located fifteen feet from the Burlington track and six feet from the transfer track. The buildings north of the

transfer track and the depot and coal shed, mentioned in evidence, obstruct a view from the engine of a train approaching the crossing along the Chicago, Burlington & Quincy Railroad from the northwest of any train which may be coming from the east along the Wabash track approaching the crossing, so that a view may be had only intermittently.

At a point two hundred and forty feet from the crossing northwest along the Burlington tracks a view may be had looking north and east of the depot of a person standing east from the crossing upon the Wabash track one hundred and fifteen feet therefrom, and not at any place closer to the crossing; and from that point east to a point upon the Wabash track two hundred and thirty-seven feet from the crossing and not at a point beyond that to the east.

From a point two hundred and seventy-six feet northwest along the Burlington track from the crossing a view may be had looking north and east of the depot of a man standing upon the Wabash track east from the crossing one hundred and nine feet, and not closer, and east from the crossing one hundred and ninety-seven feet, and not beyond that point to the east. As you approach the crossing from the northwest along the Burlington track closer than two hundred and forty feet the view of the Wabash track becomes intermittently obstructed by the coal shed and the depot until a train approaching from the east on the Wabash track could only be seen south of the depot and practically on the crossing.

The evidence of the witness Leslie, on cross-examination, shows that at a point one hundred and ninety-seven feet from the crossing northwest along the track of the Chicago, Burlington & Quincy Railroad you could see a train on the Wabash track if there had been one there, but he says nothing to show at what point upon the Wabash track the train had to be to be seen. His evidence also showed that if the pilot of the engine was at a point one hundred and ninety-seven feet from the crossing the fireman in the cab would be sixteen to eighteen feet farther to the north, and that from that point you could see a train on the Wabash track looking north of the station, but his evidence does not in any way indicate where the train would be on the Wabash track.

On the 30th day of October, 1916, Joseph J. Frese, as locomotive engineer, and Savage, as fireman, in the employ of the Burlington Railroad, were running a mixed train consisting of six or eight freight cars and two passenger coaches in interstate commerce from the northwest, traveling southeast approaching

the depot and crossing at Hulls, about 5:30 in the evening. The pilot of the engine was brought to a stop twelve or fifteen feet northwest of the stop post, as it then existed, located at the northeast corner of the section house, a distance of one hundred and ninety-seven feet northwest from the crossing.

Giving heed to the evidence of McGee as to where the stop post was then located and also as to where the engine stopped with reference to the road, and the evidence of Leslie as to the length back from the pilot the fireman is when sitting in the engine, this would place the fireman about two hundred and thirty or two hundred and forty feet northwest of the crossing.

The whistle upon the Burlington engine was sounded twice. No sounding of a whistle of the engine on the Wabash track was heard by the witness standing by the Burlington engine.

The evidence of the Wabash engineer, Long, was that at a point about three hundred feet east of the crossing he stopped his engine and freight train and whistled twice. The probable deduction from the evidence of the two witnesses, and the fact, was that the two engines whistled simultaneously. The Burlington engine then proceeded southeast along the track at a rate of speed of six or seven miles an hour, intending to stop with the train at the depot, which would throw the engine some little distance across the Wabash track to the southeast. The Wabash train proceeded west toward the crossing at a rate of speed estimated by the engineer of eight miles an hour. The pilots of the engines met at the crossing, derailing and turning over the Burlington engine and killing Frese, the locomotive engineer upon the Burlington train. The collision occurred at about 5:30 in the evening, at a time when it was light, not dark. (Witness McGee).

Further, the Wabash engineer, Long, testifying as to the conditions existing at the time of the collision, said:

Q. What was the condition of the weather? Was it clear or cloudy? A. I don't know whether it was clear or cloudy; it was just hazy-like; if you have ever been out on the road in the fall of the year you will run along maybe a half mile and you are in a haze, and maybe the next half mile it is just as clear as crystal; that is the way it was.

Q. Was it clear or hazy at Hulls at that time? A. It was kind of hazy.

Q. Was it raining? A. No; it started raining right after the wreck.

Q. I will ask you whether it was cloudy at the time of the collision? A. Must have been; it was kind of dark.

It will thus be seen that it was light enough for a person to see distinctly if intent upon what he was doing, and dark enough that a person could not see objects at any distance by a mere glance. The evidence was silent upon whether or not the locomotive engineer, Frese, when the train stopped, went over to the fireman's side to look for the approach of a train upon the Wabash tracks from the east, but that is immaterial, for the reason that if he had done so he could not have seen the Wabash train, because it was a greater distance east along the Wabash track from the crossing than he was north and west along the Burlington track from the crossing. This is deduced from the evidence of the witness, McGee, who says the Burlington train was running six or seven miles per hour, and is further established by the photographs.

Of course, Frese having sounded the whistle and started the train toward the crossing, could not at the same time have his train under control and leave his position at the throttle to look for the approach of trains on the Wabash track from the east or fireman's side of the engine.

The evidence of the witness Wade shows positively that the engineer, when at his proper post, had no view whatever of anything on the fireman's side.

The evidence of the witness McGee as to the action of the fireman, Savage, established convincingly his negligence. McGee states that from the point where the engine stopped to a point a distance of fifty or sixty feet from the crossing he observed the fireman, and that the fireman sat with his head outside the cab window looking through the front window of the cab to the southeast during all of that time. It will be remembered that the direction of the Burlington train approaching the crossing is directly southeast. From the demonstration and evidence given by McGee it is clear that Savage, in his position and looking as he was, could not have seen, even in a crystal clearness of the atmosphere, the Wabash train approaching from the east.

Witness McGee testifying:

Q. Did you notice the fireman on the Burlington engine when he passed you? A. Yes, sir.

Q. What was he doing? A. It seemed like he was looking straight ahead.

Q. What was the position of his head, with reference to sitting or leaning? A. Well, he was leaning in the cab something like this (indicating).

Q. What was he looking through as he looked for-

ward? A. It looked to me like he was looking through the front window.

Q. Was he looking outside of the cab, or looking through the front window in front of the cab? A. It looked to me like he was looking through the front window.

Q. Did you continue to watch him as he approached the crossing? A. Yes, sir.

Q. How close had his engine gotten to the Wabash crossing track when he continued in that position? A. I judge thirty to thirty-five feet.

Q. From what? A. The depot.

Q. From what part of the depot? A. The southwest corner.

Q. That would be this corner (indicating)? A. Yes, sir.

Q. How far was he from the crossing itself, in feet? A. Oh, I judge about fifty or sixty feet, something like that.

Q. Did you see what he then did? A. No, sir.

From a distance much greater than sixty feet along the Burlington track northwest of the crossing it would be impossible to see a train approaching the crossing from the east on the Wabash track, except as it emerged into view south of the depot; and from a view obtained in this manner the trains would, of course, be too close to avoid a collision.

The fireman, Savage, still in the employ of the defendant Chicago, Burlington & Quincy Railroad Company, was present at the trial, but was not placed upon the stand by defendant.

"Mr. Parkinson: We offer in evidence deposition of Mr. Savage, taken under notice given by the plaintiff.

Mr. Roberts: We object, because the witness is here.

The Court: Objection sustained."

The evidence established that it was immaterial whether headlights were lighted upon the engines or not, for the reason that in the daytime or light they would not cast any rays forward.

Robert B. Caldwell testifying:

Q. Mr. Caldwell, I neglected to ask you one question when you were on the stand. You answered a question as to whether or not an electrical headlight would show. Did you mean in the light or dark? A. In the dark.

Q. State whether or not, in daylight, either an electrical headlight or an acetylene headlight will project a light 100 feet. A. Not in daylight.

Q. State do you know what it will do at 5:30 in the month of October on the Missouri River bottom? A. I think at that time it would show some reflection.

Q. State whether or not you could tell how far it would be, a foot or ten feet or fifteen feet? A. No, sir; I couldn't tell.

The evidence showed that the customary way by which an engineer positively ascertained that a grade crossing, not controlled by semaphore, was safe was by bringing his train to a stop, ascertaining from the fireman the conditions upon his side, observing ahead upon his own side and keeping his engine under control by remaining at his post of duty.

The evidence also showed that it was customary, in approaching a railroad crossing, for the fireman to protect the engine and train from his side by observation and warning to the engineer, if necessary.

A jury, the second one which had passed favorably on the case, found for the plaintiff in the sum of twelve thousand dollars (\$12,000.00).

The plaintiff's evidence showed that the engineer was in charge of the engine, and the defendant offered in evidence a statute of Illinois, which reads as follows:

"All trains running on any railroad in this State, when approaching a crossing with another railroad upon the same level, or when approaching a swing or draw bridge, in use as such, shall be brought to a full stop before reaching the same, and within eight hundred (800) feet therefrom, and the engineer or other person in charge of the engine attached to the train shall positively ascertain that the way is clear and that the train can safely resume its course before proceeding to pass the bridge or crossing."

At the close of the plaintiff's case counsel for the defendant asked an instruction in the nature of a demurrer to the evidence, which was by the Court refused, and counsel for the defendant duly excepted.

OPINION.

I.

There are many errors assigned by counsel for the appellant, but from the view we take of the case it will not be necessary to notice but one of them, and that is the refusal of the trial court to give appellant's demurrer to respondent's evidence.

This action of the Court, in our opinion, was reversible error, for the reason that respondent's own evidence showed that the engine in question was under the control of the engineer who was killed, and under the statute of Illinois, before copied, imposed upon him the imperative duty to *positively ascertain that the way was clear* before entering upon the crossing. This he did not do; but had he done so, he clearly would not have been killed.

II.

Counsel for respondent attempt to escape the operation of the statute before mentioned by introducing evidence tending to show that there was a custom or usage in force upon the engine in question whereby it became the duty of the fireman thereof to look out for approaching engines on his side of the train and to notify the engineer in case he saw an engine approaching the crossing over which they were to cross.

The trouble with this position is, no such question was presented by the pleading, and independent of that the evidence introduced does not tend to show that the officers in charge of the appellant company had any notice of the existence of said custom. Moreover, in my opinion, the existence of such a custom, if it existed, could not have the effect to abrogate the statute mentioned.

In a somewhat similar case, the Supreme Court of the United States, in discussing this question, used this language:

"His fate gives pause to blame, but we cannot help pointing out that the tragedy of the collision *might have been appalling*. He brought *death to himself* and to the conductor of his train. His neglect *might have extended* the catastrophe to the destruction of passengers in the colliding train. How imperative his duty was is manifest. To excuse its neglect in any way would cast immeasurable liability upon the railroads, and, what is of greater concern, remove security from the lives of those who travel upon them; and therefore all who are concerned with their operation, however high or low in

function, should have a full and an anxious sense of responsibility."

Great Northern Ry. vs. Wiles, 240 U. S. 444, l. c. 448.

For the reasons stated, the judgment of the Circuit Court is reversed, and judgment will hereby be rendered for the appellant.

A. M. WOODSON, P. J.

Graves, Higbee and David E. Blair, J. J., concur. Elder, J., concurs in the result; James T. Blair, C. J., and Walker, J., concur in reversing the judgment, but think the cause should be remanded.

II. THE PETITIONER'S CONTENTION IS:

That whether or not the Missouri Supreme Court, in its opinion, correctly or incorrectly construed the Illinois statute (even though in conflict with the only cited decision of an Illinois Appellate Court construing the statute), as establishing negligence on the part of Joseph J. Frese as a matter of law, that such negligence could not and did not relieve the company entirely from liability on account of the negligence of the fireman, Savage, and that Section 3 of the Employers' Liability Act, April 22, 1908, preserved to the plaintiff the total damages suffered, diminished by the jury in proportion to the amount of negligence attributable to Joseph J. Frese.

Employers' Liability Act, April 22, 1908, 35 Statutes at Large, page 65, Chapter 149, Section 3 thereof, is as follows:

"Sec. 3. In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

ASSIGNMENT OF ERRORS.

(1) The Supreme Court of the State of Missouri en banc erred in holding that the Illinois statute, as set forth in its opinion, making Joseph J. Frese guilty of negligence as a matter of law, in not "having positively ascertained that the way was clear and that the train could safely resume its course before proceeding to pass the crossing," precluded plaintiff from recovering any damages, for by so doing plaintiff was precluded from recovering not only full but also diminished or proportional damages.

(2) The Supreme Court of the State of Missouri en banc erred in holding that plaintiff was precluded from recovering diminished or proportional damages by reason of the fact that Joseph J. Frese was guilty of negligence as a matter of law in not "having positively ascertained that the way was clear and that the train could safely resume its course before proceeding to pass the crossing."

(3) The Court erred in construing the Illinois statute to be an absolute bar to any recovery by the plaintiff, for it thereby precluded plaintiff from recovering diminished or proportional damages even though Joseph J. Frese was guilty of negligence as a matter of law.

(4) Under Section 3 of the Employers' Liability Act the plaintiff was entitled to recover at least diminished or proportional damages, and the Court erred in holding that the negligence of Joseph J. Frese precluded plaintiff, under the Illinois statute hereinbefore quoted, from all recovery.

BRIEF AND ARGUMENT.

As the case was submitted to the jury authorizing a verdict in plaintiff's favor only upon the finding by the jury that the fireman, Savage, was guilty of negligence causing the death of Joseph J. Frese, and as the Supreme Court of Missouri would have no occasion to determine the question of whether or not Joseph F. Frese, the engineer, was guilty of contributory negligence unless it first concluded that negligence sufficient to sustain a verdict was established by reason of the acts of the fireman, Savage, we assume that the position of the plaintiff, petitioner herein, asserted in the Supreme Court of Missouri that the fireman, Savage, was negligent, was sustained.

While it is true that if the Supreme Court of Missouri had the right, although in conflict with the construction placed upon the statute by the courts of Illinois, where the collision occurred, to determine whether or not a fair construction of the

Illinois statute made the engineer, Joseph J. Frese, guilty of negligence as a matter of law, we do not think that such a finding would properly destroy the verdict in the case, for the reason that the plaintiff would have the right to introduce in evidence all of the facts and circumstances surrounding the collision, and would have the right to argue to the jury as minimizing the negligence of Frese in comparison with the negligence of Frese and Savage, the very argument or decision made in the only cited decision of the Illinois Appellate Courts construing this statute, being the case of *St. Louis National Stock Yards vs. Godfrey*, 101 Ill. App. page 40 (affirmed by the Supreme Court of Illinois, reported in 198 Ill. 292), in a suit by an engineer who was injured by a collision at a railroad crossing, where the Court stated, l. c. 43:

"Their contention is that appellee was guilty of negligence on his part which contributed to his injury; that his conduct, as shown by the evidence, was negligence *per se*—negligence established in law—and that the Court should have so held and instructed the jury accordingly. They contend that he violated the statute, Sec. 81, Chap. 114, Starr & Curtis:

'All trains running on any railroad in this State, when approaching a crossing with another railroad upon the same level * * * shall be brought to a full stop before reaching the same, and within eight hundred feet therefrom, and the engineer or other person in charge of the engine attached to the train shall positively ascertain that the way is clear, and that the train can safely resume its course, before proceeding to pass the * * * crossing.'

"We are of opinion this statute has no application to the interappings and crossings of a labyrinth of a company's own tracks in its own switch yard, such as the one in question. But if we assume this statute does apply, we can not hold that the evidence conclusively shows that appellee failed to comply with its requirements. It is not suggested that the statute requires that he should have done any particular act that he did not do, but counsel insist that the statute requires that he should 'positively' ascertain that his engine could 'safely resume its course' before proceeding. The position is: He did not, in fact, succeed in getting safely over the crossing, therefore he did not positively ascertain that it was safe to resume his course before proceeding, i. e., was guilty of violating the statute. This position is un-

sound, for when he proceeded, after the stop, the way was clear, and he could safely resume his course. The fact alone that after he resumed his course, and as he progressed, the way became obstructed by the unexpected and unannounced approach of appellant's train, does not conclusively establish appellee's guilt."

The Illinois statute was in evidence before the jury, and the facts and circumstances surrounding the collision were in evidence before the jury, and a declaration of law to the jury that the failure of Frese to prevent a collision was negligence as a matter of law, by reason of the Illinois statute, would not, in our opinion, have substantially aided the railroad company, or even changed the issue which the jury were to decide, for the reason that they were compelled to give the same consideration to the conduct of Frese that would be necessary on a new trial with an instruction that the statute made him guilty of negligence as a matter of law, instead of leaving to the jury the determination of the character of his acts. It would be necessary for the jury to make a comparison of the acts of Frese in connection with the collision, and the acts of both Frese and Savage, the fireman, in order to render a verdict, and they had all of these facts before them under instructions, which left to them to determine the character of the acts of Frese and to what extent they contributed to the result.

In an action for negligent death, decedent is presumed to have used reasonable care for his own safety, in the absence of evidence to the contrary.

Grant vs. Kansas City Southern Ry. Co., 190 S. W. 586 (Mo. Sup.).

Bueshing vs. St. Louis Gas Light Co., 73 Mo. 219.

Capp vs. St. Louis, 251 Mo. 345, l. c. 373.

Tibbels vs. C. G. W. Ry. Co., 219 S. W. (Mo. App.) 109.

Wack vs. Railroad, 175 Mo. App. 111, l. c. 122.

Except for the admissions in the pleadings and during the trial, there is not one scintilla of evidence concerning the conduct of the decedent, Frese, as locomotive engineer, except that he brought his train to a stop and whistled, in compliance with the law, within 800 feet of the crossing, and at a point, stated by the appellant in quoting the evidence (Appellant's Statement, Brief and Suggestions, page 5), 249 feet from the grade crossing, and (top of page 6) 239.4 feet from the crossing. It is not pointed out anywhere in appellant's brief in what particular the engineer failed to comply with the statutory law of Illinois, or in what particular he was negligent. The evidence unquestionably showed he could not see trains approaching from the

fireman's side on the Wabash track, and that he was running six or seven miles an hour. What he failed to do that he should have done, or what he did that he should not have done, is nowhere pointed out. It is not pretended that he could have left the throttle of his engine. It can not be pretended that he would have heard the Wabash train approaching with the noises of his own train about him. He did nothing that he should not have done and he did not fail to do anything that he could or should have done to see that the way was clear and that it was safe for him to make the crossing.

How different were the acts of Savage, the fireman, who was on the side of the engine from which the peril came. Whether or not Frese was guilty of negligence as a matter of law, situated as he was on the side of the engine opposite from the approaching peril, and in a position in which he could not have observed it, what was the conduct of the fireman, Savage, who was on the side of the engine, and the only person on the side of the engine, from which the Wabash train approached?

Railroad tracks in and of themselves suggest danger, and everyone having reached the age of reasonable discretion is presumed to know this fact, and the law therefore enjoins the duty upon one approaching a railroad track and crossing to exercise ordinary care by looking and listening for approaching trains, and the action of the fireman, Savage, in approaching the Wabash Railroad track and crossing with his head outside of the side cab window and looking through the front window in the direction in which he was going, and not to the side, was, if not negligence as a matter of law, gross negligence as a matter of fact.

Dyrcz vs. Mo. Pac. Ry. Co., 238 Mo. 33, l. c. 46.

Holland vs. Mo. Pac. Ry. Co., 210 Mo. 338.

Connor vs. Wabash R. R. Co., 149 Mo. App. 675, l. c. 686.

McNeil vs. Mo. Pac. Ry. Co. (Mo. App), 182 S. W. 762.

A pedestrian, a person traveling in a wagon, on a bicycle, in an automobile or on a railroad engine, approaching a crossing and railroad track, is held, as a matter of law, to know that it is dangerous.

In Dyrcz vs. Railroad, *supra*, this Court, speaking through Mr. Justice Lamm, said, l. c. 46:

"In the law of negligence a railroad track in and of itself is an unequivocal and large sign of danger. It stands there mutely but unmistakably crying aloud, 'Danger!' It is much the same as if one stood there and

with a trumpet called out, 'Beware!' 'Look out for the cars!' 'Look out for yourself!' 'Look well to what you are about to do, for you are taking your life in your hands!' 'Use your eyes!' 'Use your ears!' 'Use your common sense!'"

It will thus be seen that it was the duty of the fireman, Savage, to use care to look for the approach of an engine or train to the crossing from his side. This duty he failed to perform. The evidence shows that from the time the Burlington train stopped and whistled for the crossing up to a point within fifty or sixty feet of the crossing, and to a point where it would be impossible to see a train approaching from the east on the Wabash track, this fireman sat in one position, with his head leaning upon his left hand and his left arm resting upon the cab sill, with his head outside of the side window and looking forward directly in the direction in which the train was going, to-wit, southeast, through the front window of the cab. Of necessity, considering the hazy condition of the atmosphere and his position, he could not and did not see the Wabash train approaching from the east. From the time that his engine stopped and whistled, by looking as he approached the crossing to a point within 125 feet of the crossing, he could have seen the Wabash train coming toward the crossing in ample time to have warned the engineer and saved his life.

For a railroad company to ask a court, in view of their repeated contentions to the contrary, to say that there is no duty upon one approaching a railroad track to turn his head and look in the direction which will permit a view of an oncoming train upon a track which is about to be crossed, but that one may rely upon such a view as may be obtained by a glance from the eye, is an absurdity.

Equally absurd would be the contention that an inference may be drawn from the evidence that a fireman guilty of such gross conduct and negligence as that of Savage may have seen the oncoming Wabash train and may have told the engineer, Frese, about it.

The plaintiff is not contending that the fireman, Savage, heard or could have heard the oncoming Wabash train. The fact that the whistle on the Wabash train sounded, taken in connection with the fact that the witness, McGee, who stood beside the fireman, did not hear it, and the fact that the Wabash engineer did not hear the Burlington train whistle, shows conclusively that the whistles were sounded simultaneously. There is no pretense that the fireman, sitting in his own engine, with

the noise of his own engine and train about him, could have heard, by the most intense listening, any noise made by the Wabash train; nor do we pretend to claim that in the hazy condition of the atmosphere the fireman, even if he had turned his head and looked intently, could have seen any smoke from the Wabash train. There may have been none, and if any, it may not have been visible in the existing condition of the atmosphere. But one thing is certain, if he had turned his head and looked he would have seen the oncoming Wabash train; and another thing is certain, that by merely sitting with his head out of the window, leaning upon his hand, in the manner demonstrated to the Court and jury, he could not, by any mere shifting of the eye in its socket, have seen the oncoming train.

Such a contention carries its own refutation and is in keeping with the defendant's conduct in having the fireman, Savage, at the time of the trial, in its employ, present in the court at the trial, and failing to put him upon the witness stand to testify.

The failure of a party to call witnesses in its employ and under its control, who know vital facts affecting the issue upon which the case is tried, is a strong circumstance against such party.

McCord vs. Schaaf, Rec., 216 S. W. 320 (Mo. Sup.).

Willitts vs. C. B. & Q. R. R. Co., 221 S. W. 65 (Mo. Sup.).

Schooler vs. Schooler, 258 Mo. 83, l. c. 95.

Phillips vs. Western Union Tel. Co., 194 Mo. App. 458, l. c. 470.

Van Nest vs. Ry. Co., 181 Mo. App. 373, l. c. 379.

McClanahan vs. Railroad, 147 Mo. App. 386, l. c. 412, and the numerous authorities cited therein.

In the case of McCord vs. Schaaf, *supra*, being an action against a railroad company for negligence resulting in the death of its locomotive fireman, this Court held that the defendant's failure to call as witnesses the engineer and student fireman, who were on the engine at the time of the fatal explosion, was a strong circumstance against the defendant.

In the case of Willitts vs. Chicago, Burlington & Quincy Railroad Company, the Court held that the failure of the plaintiff to call her family physician, who had visited her, to testify concerning her injuries warranted an inference that such evidence would not have been favorable, and this in a case where the physician resided outside of the State of Missouri and was not present at the time of the trial.

In the case at bar the plaintiff had taken the deposition of the witness, Savage, and offered it in evidence. The defendant, who had peculiarly within its own knowledge the attitude of the witness and what he would swear to if not in accordance with the deposition, failed to put him upon the stand, after objecting to the use of the deposition.

In the McClanahan case, *supra*, the Court quoted with approval from 1 Starkie on Evidence, page 54:

"The conduct of a party in omitting to produce that evidence in elucidation of the subject matter in dispute which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises a strong suspicion that such evidence, if adduced, would operate to his prejudice."

And further quoted with approval, l. c. 413, the statement that "*to smother evidence is not much better than to fabricate it.*"

It will thus be seen that even if the Missouri Supreme Court had the right to decide, in conflict with the decision of the Illinois Appellate Courts, that Joseph J. Frese, the engineer, was guilty of negligence as a matter of law in not having prevented the collision, that the real and substantial cause of the collision was the negligence of the fireman, Savage, and under the beneficent provisions of Section 3 of the Employers' Liability Act a recovery cannot be denied to the plaintiff, but her recovery only diminished in the proportion that the negligence of Frese bore to the combined negligence of Frese and Savage.

Such has been the previous holding of this Court in the case of Union Pacific Railroad Company vs. Hadley, 246 U. S. 330, 62 Law Ed. 751, in a suit where there was a rear end collision, and where the deceased was the rear brakeman, whose duty it was to protect his train against the approach of a train from the rear while it was standing, by going back to warn any following train by lights, torpedoes or flag, and who failed to do this, but instead remained in the caboose and was killed, and for whose death the suit was being prosecuted. The Supreme Court, speaking through Mr. Justice Holmes, said:

* * * "But it is said that, in any view of the defendant's conduct, the only proximate cause of Cradit's death was his own neglect of duty. But if the railroad company was negligent, it was negligent at the very moment of his final act. It ran one train into another, when, if it had done its duty, neither train would have

been at that place. Its conduct was as near to the result as that of Cradit. We do not mean that the negligence of Cradit was not contributory. We must look at the situation as a practical unit, rather than inquire into a purely logical priority. But even if Cradit's negligence should be deemed the logical last, it would be emptying the statute of its meaning to say that his death did not 'result in part from the negligence of any of the employees of the road.'

* * * The account of the weather and other circumstances on the plaintiff's side made it possible for the jury to believe that Cradit's duty was so nearly impossible of performance that no substantial allowance should be made on that account."

It is our contention that an injured servant bringing a suit under the Employers' Liability Act might be guilty of negligence as a matter of law on the admitted facts and yet recover for the negligence of a fellow servant, although the question of the fellow servant's negligence depended upon disputed facts and inferences which are properly left to the jury for determination; i. e., that the negligence of the fellow servant to be determined by the jury might be gross compared with the negligence in law of the plaintiff.

We respectfully submit that this Court should order and direct the Supreme Court of Missouri to set aside its judgment and order reversing the judgment of the Circuit Court of Buchanan County, Missouri, and to either reinstate the judgment and verdict of the Circuit Court of Buchanan County, Missouri, or to make an order reversing and remanding the case to the Circuit Court of Buchanan County, Missouri, with instructions for its further trial and action in accordance with the opinion of this Court, but we respectfully submit that the order should simply direct the Supreme Court of the State of Missouri to reinstate and affirm the judgment of the Circuit Court of Buchanan County, Missouri, for the reason that no substantial right was denied the company by the failure of the trial court to characterize the acts of Frese as negligent in law.

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